Supreme Court, U.S.
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No.

In the
Supreme Court of the United States

POWER ENGINEERING COMPANY;
REDOUBT, LTD.; and RICHARD J. LILIENTHAL,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

When a state that is authorized under the Resource Conservation and Recovery Act to "administer and enforce" a state hazardous waste program "in lieu" of a federal program prosecutes an enforcement action, may the federal Environmental Protection Agency undertake a separate enforcement action against the same defendant for the same violation?

PARTIES TO THE PROCEEDINGS

Petitioners are Power Engineering Company, Redoubt, Ltd., and Richard J. Lilienthal. Respondent is the United States of America.

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PETITION FOR WRIT OF CERTIORARI

Power Engineering Company, Redoubt, Ltd., and Richard J. Lilienthal, respectfully petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The opinion of the court of appeals, *United States v. Power Engineering Company, et al.*, is reported at 303 F.3d 1232 (10th Cir. 2002), and is included at Appendix B. The opinion of the district court is reported at 125 F. Supp. 2d 1050 (D. Colo. 2000), and is included at Appendix C.

JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit was entered on September 4, 2002. On November 14, 2002, this Court granted an extension of time to file a Petition for Writ of Certiorari to January 17, 2003 (Application No. 02A393) (Appendix A). This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS AT ISSUE

The pertinent provisions of the Resource Conservation and Recovery Act are found at 42 U.S.C. § 6926(b), (d), and (e); § 6928(a)(1)-(2); and § 6972(b)(1)(B), and are set out in Appendices F, G, and H.

INTRODUCTION

This is not the first case in which the Environmental Protection Agency (EPA) has invaded a state's enforcement authority and filed an overlapping and inconsistent federal suit when the state has already initiated its own enforcement action for the same violations—a practice known as "overfiling." It is, however, the first case creating a conflict in the circuits over the EPA's authority to "overfile" under the Resource Conservation and Recovery Act (RCRA). In *Harmon Industries, Inc. v. Browner*, 191 F.3d 894 (8th Cir. 1999) (Appendix I), the Eighth Circuit held that EPA was barred from "overfiling" under RCRA. However, the Tenth Circuit in this case expressly rejected the *Harmon* analysis and concluded that EPA "overfiling" in a RCRA action is allowed. To resolve this conflict, this Court should grant the Petition for Writ of Certiorari.

This case warrants Supreme Court review for other reasons as well; it raises an important question of national scope that implicates the reach of federal enforcement authority, the ability of the states to pursue their own enforcement strategies without the threat of federal interference, and federal-state cooperation. With increasing frequency, EPA is undermining state enforcement efforts under a number of federal environmental statutes. *See* Hubert H. Humphrey & LeRoy C. Paddock, *The Federal and State Roles in Environmental Enforcement: A Proposal for More Effective and More Efficient Relationship*, 14 Harv. Envtl. L. Rev. 7 (1990). *See also* Mark J. Zimmerman, *RCRA Overfiling by EPA: The Start of a Trend?*, 13 Envtl. Compliance & Litig. Strategy No. 1 at 5 (1997).

In addition to RCRA, the states may administer and enforce their own environmental programs under the Clean Water Act (CWA) and the Clean Air Act (CAA). These state programs must be equal to, or more stringent than, the

corresponding federal law and the state programs must be approved by EPA. But, the Agency still overrides state permit decisions and files duplicative federal suits against polluters because EPA is dissatisfied with the conditions imposed or the penalties sought. This insidious practice wastes federal, state, and private resources, and breeds distrust between state and federal enforcers. It also generates uncertainty among the citizens in the regulated community who cannot rely on their dealings with state officials so long as EPA claims it can override state enforcement decisions. EPA maintains it has virtually unlimited authority to "overfile" under RCRA. *See* Bryan S. Miller, *Understanding Overfiling: The Impact of Two Recent Federal Cases on EPA Overfiling*, 15 J. Envtl L. & Litig. 21 (2000). But, this appears to be an "about face" for EPA: "In adopting this policy, the Agency overruled internal adjudicatory decisions that held that RCRA does not allow for the practice." *Id.* Miller questions whether EPA may "overfile" at all, under any environmental statute. *Id.*

So disruptive has "overfiling" become, or, more accurately, the threat of "overfiling," that the Senate has held hearings to consider the matter. *See* Hearing before the Environment and Public Works, United States Senate, 105th Cong., Sess. 1, (1997) on the Relationship Between the Federal and State Governments in the Enforcement of Environmental Laws. The validity of EPA "overfiling" is clearly an important federal question justifying review by this Court. The resolution of this question has become a matter of necessity, however, in light of the conflict the decision below has created with the Eighth Circuit decision in *Harmon Industries*.

STATEMENT OF THE CASE

A. Statutory Background

RCRA provides for the regulation of hazardous waste through federal leadership and incentives while recognizing that the collection and disposal of hazardous waste "should continue to be primarily the function of State, regional, and local agencies . . . ." 42 U.S.C. § 6901(4) (Appendix D). Under RCRA, any state may seek to "administer and enforce" a hazardous waste program upon approval by the EPA. 42 U.S.C. § 6926(b). If approved, the state is authorized to carry out its hazardous waste program "in lieu" of a federal program and, among other things, to issue and enforce permits for the storage, treatment, or disposal of hazardous wastes. *Id.* EPA approves a state program only when the Administrator has found (1) the state program is "equivalent to the Federal program," (2) the state program is "consistent with the Federal program" and other state programs, and (3) the state program provides "adequate enforcement of compliance" with RCRA requirements. *Id.*

The effect of an authorized or permitted state program is that "[a]ny action taken by a state under a hazardous waste program . . . shall have *the same force and effect* as action taken by the Administrator [of the EPA] . . . ." 42 U.S.C. § 6926(d) (emphasis added).

The federal remedy for state noncompliance with the permitted state program is withdrawal of federal authorization:

> Whenever the Administrator determines after public hearing that a State is not administering and enforcing a program authorized under this section [42 U.S.C. § 6926] in accordance with requirements of this section, he shall so notify the State and, if appropriate corrective action is not taken within a reasonable time, not to exceed ninety days, the Administrator shall withdraw authorization of such

> program and establish a Federal program pursuant to this chapter. The Administrator shall not withdraw authorization of any such program unless he shall first have notified the State, and made public, in writing, the reasons for such withdrawal.

42 U.S.C. § 6926(e).

B. Procedural Background and Statement of Facts

For almost twenty years, the State of Colorado has administered and enforced its own hazardous waste program "in lieu" of a federal program. That program is EPA approved and is codified as the Colorado Hazardous Waste Management Act. 49 Fed. Reg. 41036 (Nov. 2, 1984) (Final Authorization of State Hazardous Waste Management Program). The Colorado Department of Public Health and Environment (CDPHE) carries out the state program. *See United States v. Power Engineering Company*, 303 F.3d 1232, 1235 (10th Cir. 2002) (Appendix B). At no time has EPA sought to withdraw authorization of the State hazardous waste program.

Power Engineering Company operates a metal refinishing and chrome electroplating business in Denver, Colorado. *Id.* Redoubt, Ltd., leases land and buildings to Power Engineering and Richard Lilienthal is an officer and the sole owner of both companies (collectively "PEC"). *Id.* The electroplating and refinishing processes produce regulated hazardous waste. *Id.* In 1986, PEC notified CDPHE that it was a generator of hazardous waste. *See United States v. Power Engineering Company*, 191 F.3d 1224, 1230 (10th Cir. 1999). After a compliance inspection in 1993, however, CDPHE cited PEC for treating, storing, and disposing of certain hazardous wastes without a permit and charged that chromium from the Power Engineering site had contaminated the soil and the groundwater. *Power Engineering*, 303 F.3d at 1235. CDPHE issued an Initial Compliance Order in July, 1994, and a Final Compliance Order in June, 1996, directing PEC to clean up the contamination,

conduct frequent inspections, submit periodic cleanup reports, and follow all hazardous waste laws. *Id.* Before CDPHE issued its Final Compliance Order, EPA asked CDPHE to enforce the requirements of RCRA and the Colorado regulations and require financial assurances from PEC. *Id.* at 1235-36. However, CDPHE chose not to demand financial assurances. *Id.* at 1236.

In August, 1996, EPA notified CDPHE that it had failed to take timely and appropriate action with respect to PEC by not assessing a civil penalty. When PEC did not comply with all of the requirements of the cleanup order, CDPHE ordered PEC in December, 1996, to pay civil penalties of $1.13 million and sought enforcement of its orders in State court on August 1, 1997. *See id.* at 1235. Relying on RCRA and the State's regulations, the United States (on behalf of EPA) "filed its own lawsuit against PEC for the same violations" simultaneously with the State action. *Id.* However, contrary to the State, EPA sought civil penalties, an injunction to stop PEC's hazardous waste operations, and financial assurances. Among other things, the district court granted the United States a preliminary injunction requiring PEC to provide financial assurances of $3.5 million. *See United States v. Power Engineering Company*, 10 F. Supp. 2d 1145 (D. Colo. 1998). That preliminary injunction was upheld on appeal by the Tenth Circuit. *See Power Engineering*, 191 F.3d 1224. In March, 1999, the state court held the CDPHE orders were enforceable. 303 F.3d at 1235. After these decisions, the United States dropped all of its claims except for financial assurances and amended its complaint.

In district court, the United States and PEC filed cross-motions for summary judgment. In reliance on the Eighth Circuit decision in *Harmon Industries*, PEC argued that RCRA and res judicata prohibited the EPA from "overfiling," or filing a federal enforcement action when the state has already undertaken an enforcement action for the same conduct under

its federally-authorized hazardous waste program. *Power Engineering*, 303 F.3d at 1236. The district court ruled for EPA and held that PEC must provide financial assurances (later fixed at $2,119,044) and obtain liability coverage for accidental occurrences. *See United States v. Power Engineering Company*, 125 F. Supp. 2d 1050 (D. Colo. 2000) (Appendix C). On appeal, the Tenth Circuit rejected *Harmon Industries'* interpretation of RCRA and affirmed the district court on grounds that a federally-authorized state hazardous waste program does not stand "in lieu" of the federal program for enforcement purposes. 303 F.3d at 1236-40. This created an express conflict between the Eighth and Tenth Circuits. To resolve this conflict, PEC petitions this Court for a writ of certiorari.

REASONS FOR GRANTING THE WRIT

In this case, Petitioners challenge EPA's expanding practice of undermining state enforcement decisions by "overfiling" under RCRA. But this case has implications beyond its precise facts. Whether EPA may interfere in this way with state enforcement efforts under RCRA will likely define the federal-state relationship for other federal environmental laws as well. In addition to RCRA, EPA has "overfiled" under the CWA, the CAA, Superfund, and others. *See* Humphrey, *supra*.

The question for this Court is whether a state has exclusive authority to enforce its EPA-approved hazardous waste program—unless EPA withdraws its approval of the state program or the state fails to initiate an enforcement action. The Tenth Circuit in this case decided that the "in lieu" and "same force and effect" language of RCRA does not bar the federal government from filing its own enforcement action when the state has already acted to address the same violations. But, that

decision expressly conflicts with a decision of the Eighth Circuit in *Harmon Industries*.

Moreover, an objective of RCRA, as with similar environmental laws, is to establish a viable federal-state partnership in the Act's implementation. This is essential to achieving the statutory goals of a cleaner and safer environment. However, the EPA's practice of supplanting state enforcement decisions generates distrust, creates uncertainty, and defeats attempts at meaningful cooperation between state and federal officials. The EPA's practice of undermining state enforcement efforts also wastes public and private resources, conflicts with the historical role of states in dealing with local environmental problems, and is counterproductive.

For these reasons, the petition should be granted.

I

BECAUSE THE TENTH CIRCUIT DECISION BELOW AUTHORIZES THE EPA PRACTICE OF "OVERFILING" UNDER RCRA THAT WAS INVALIDATED BY THE EIGHTH CIRCUIT IN *HARMON INDUSTRIES*, THIS CASE PRESENTS A CONFLICT BETWEEN CIRCUITS THAT MUST BE RESOLVED BY THIS COURT

Harmon Industries involved an "overfiling" action in the State of Missouri. Like Colorado, the State of Missouri is authorized to enforce it's own hazardous waste program "in lieu" of a federal program. Pursuant to this authority, the Missouri Department of Natural Resources (MDNR) settled with Harmon Industries, Inc., relative to contaminated property at Harmon's assembly facility in Grain Valley, Missouri. At this facility, Harmon assembled circuit boards for railroad equipment. From 1973 through 1987, Harmon employees used organic solvents to clean soldering flux from the circuit boards. During that time, Harmon employees collected residual solvent in three to five gallon pails. Every few weeks, Harmon

maintenance workers would throw the solvent literally out the back door onto the ground. This amounted to about 30 gallons of solvent a month. Harmon management was unaware of this practice and assumed the solvent was used until depleted. Harmon management discovered this disposal practice during a safety inspection in 1987. In response to this discovery, Harmon switched to a nonhazardous cleaning material and ceased to generate hazardous waste. Harmon also conducted an investigation of the contaminated site and voluntarily reported its illegal activities to the state.

Harmon investigators ultimately determined the disposal site did not pose a risk to human health or the environment due to low levels of contamination, the lack of groundwater resources, and the absence of exposure pathways. Based on these findings, Harmon proposed leaving the contaminants in the ground and submitted a closure report for the site to MDNR. MDNR approved the closure report and issued a closure permit on condition that Harmon maintain liability coverage for the site for the next thirty years.

Harmon spent over $800,000 to change its assembly process, with annual costs estimated at $250,000, and $1.4 million for site investigation, with anticipated post-closure costs of about $500,000. MDNR apparently believed Harmon acted in good faith and, over objections by the EPA, never filed an enforcement action against Harmon seeking civil penalties. Instead, MDNR entered into a court-approved consent decree with Harmon specifying essentially that Harmon's compliance with the consent decree "constitutes full satisfaction and release from all claims" arising from the incident. Notwithstanding this consent decree, however, the EPA filed an administrative complaint against Harmon for civil penalties of $2,777,324. This was reduced to $586,716 by an administrative law judge. The penalty was upheld by the Environmental Appeals Board but overturned by the United States District Court for the Western District of Missouri.

The district court reasoned that if state enforcement actions under RCRA are to have the "same force and effect" as actions taken by the Administrator of the EPA, the EPA cannot "modify, by piecemeal measures, any action taken by states." *Harmon Industries v. Browner*, 19 F. Supp. 2d. 988, 996 (D. Mo. 1998). The court determined the language of the statute prohibited "overfiling" by the EPA and concluded that EPA was bound by the consent decree. This decision was affirmed by the Eighth Circuit on appeal. *See Harmon Industries, Inc. v. Browner*, 191 F.3d 894 (Appendix I).

After observing that the statutory permissibility of "overfiling" was a question of first impression in the federal circuits, the Eighth Circuit first looked to the statutory language of RCRA authorizing a state to administer and enforce a hazardous waste program "in lieu" of a federal program. *Id.* at 897-98. The court concluded: "The plain "in lieu of" language contained in the RCRA [42 U.S.C. § 6926(b)] reveals a congressional intent for an authorized state program to supplant the federal hazardous waste program in all respects including enforcement." 191 F.3d at 899. The court also noted the plain language of section (d) that states, "Any action taken by a state under a hazardous waste program authorized under [RCRA] [has] the same force and effect as action taken by the [EPA] under this subchapter." 42 U.S.C. § 6926(d). According to the Eighth Circuit: "The "same force and effect" language of section 6926(d) provides additional support for the primacy of the states' enforcement rights under the RCRA when the EPA has authorized a state to act in lieu of it." *Harmon*, 191 F.3d at 899.

The court also found congressional intent evident in RCRA's provision allowing the EPA to withdraw authorization from a state if the state's program "does not provide adequate enforcement of compliance with the requirements of" RCRA. 191 F.3d at 899. *See also* 42 U.S.C. § 6926(e) (Withdrawal of authorization). "This language," the court stated, "indicates

that Congress intended to grant states the primary role of enforcing their own hazardous waste program." 191 F.3d at 899. This indication is not undermined, the court concluded, as EPA argued, by the language of section 6928:

> [S]ection 6928(a)(1) allows the EPA to initiate enforcement actions against suspected environmental violators, except as provided in section 6928(a)(2). Section 6928(a)(2) permits the EPA to enforce the hazardous waste laws contained in the RCRA if the agency gives written notice to the state.

Id.

But, the court observed, these two sections must be interpreted in light of the entire Act.

> Harmonizing the section 6928(a)(1) and (2) language that allows the EPA to bring an enforcement action in certain circumstances with section [6926]'s provision that the EPA has the right to withdraw state authorization if the state's enforcement is inadequate manifests a congressional intent to give the EPA a secondary enforcement right in those cases where a state has been authorized to act that is triggered only after state authorization is rescinded or if the state fails to initiate an enforcement action.

Id.

According to the court, the notice requirement of section 6928(a)(2) "reinforces the primacy of a state's enforcement rights under RCRA" by allowing a state an opportunity to initiate its own enforcement action. *Id.* Only if the state fails to act may EPA initiate its own action. *Id.* "Thus, the notice requirement is an indicator of the fact that Congress intended to give the states, that are authorized to act, the lead role in enforcement under RCRA." *Id.*

EPA countered by citing the citizen suit provision of the Act. Section 6972(b)(1)(B) states that "if the [EPA] or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States or a State," then a private citizen suit is not allowed. EPA argued that if Congress had intended to limit the Agency's right to "overfile," it would have stated its intent like it did in the citizen suit provision. 191 F.3d at 900. But the Eighth Circuit was not persuaded. The court observed that section 6972 is directed at private enforcement whereas section 6926 is directed at state enforcement. *Id.* "The mere fact that Congress did not choose to employ the exact same language as contained in an unrelated part of the act does not detract from the plain language used in the state authorization section." Further, the court reiterated: "Congress provided that the state's program should operate in lieu of the federal program and that the state action should operate with the same force and effect as action taken by the EPA." *Id.* at 900-01.

In response to EPA's argument that the language of RCRA is ambiguous, the Eighth Circuit cited several excerpts from the legislative history that support the primacy of the states' enforcement rights. *See, e.g.*, H.R. Rep. 1491, 94th Cong., 2nd Sess. 24, *reprinted in* 1976 U.S.C.C.A.N. 6262 ("It is the Committee's intention that the States are to have primary enforcement authority and if at any time a State wishes to take over the hazardous waste program it is permitted to do so, provided that the State laws meet the federal minimum requirements for both administering and enforcing the law."). *See also* 1976 U.S.C.C.A.N. at 6269 (Although the "legislation permits the states to take the lead in the enforcement of the hazardous wastes laws . . . the Administrator [of the EPA] is not prohibited from acting *in those cases* where the state fails to act, or from withdrawing approval of the state hazardous waste plan and implementing the federal hazardous waste program pursuant to . . . this act.") (emphasis added).

Based on these excerpts, and others, the court concluded: "The House Report thus supports our interpretation of the statute—that the federal government's right to pursue an enforcement action under the RCRA attaches only when a state's authorization is revoked or when a state fails to initiate any enforcement action." 191 F.3d at 901. Therefore, the Eighth Circuit held that the EPA practice of "overfiling" is statutorily impermissible: "There is no support either in the text of the statute or the legislative history for the proposition that the EPA is allowed to duplicate a state's enforcement authority with its own enforcement action." *Id.* But, the Tenth Circuit in this case expressly rejected this analysis and came to the opposite conclusion.

In the decision below, the court correctly observed that *Harmon* found that "the administration **and** enforcement of the [hazardous waste] program are inexorably intertwined." *Id.* (emphasis added). However, the Tenth Circuit disagreed with this conclusion: "This interpretation fails to account for the placement of "enforcement" and "in lieu of" in separate clauses of section 6926(b), and it does not adequately consider the structure of the statute." *Power Engineering*, 303 F.3d at 1238. Therefore, the Tenth Circuit rejected *Harmon's* interpretation that "in lieu" authorization of a state hazardous waste program deprives EPA of its enforcement powers.

The Tenth Circuit also rejected the *Harmon* court's interpretation of "the same force and effect" language. Section 6926(d) states: "Any action taken by a State under a hazardous waste program authorized under this section shall have the same force and effect as action taken by the [EPA] under this subchapter." 42 U.S.C. § 6926(d). Whereas *Harmon* "found that this section applies broadly to any action authorized under this subchapter, including enforcement," the court in this case concluded:

> According to this interpretation, the statute substitutes state enforcement action for EPA enforcement action and therefore does not permit an EPA lawsuit when a state has initiated an enforcement suit. This interpretation reads too much into the provision. The provision must be read in the context of the language and design of the statute as a whole.

303 F.3d at 1239.

Of course, that's exactly what the *Harmon* court did. It construed this section so as to avoid a conflict with section 6928(a)(1) and (2) which the EPA argues gives the agency carte blanche to file a separate lawsuit when a state has already taken action. But the Tenth Circuit dismissed the notion that administration of a hazardous waste program and enforcement of a hazardous waste program are "inexorably intertwined," as the *Harmon* court held. In the words of the Tenth Circuit, the Eighth Circuit's harmonizing of RCRA

> [g]oes well beyond the plain language of the statute. While *Harmon* correctly states that section 6928(a) limits the EPA's right to bring an enforcement action to "certain circumstances," the only explicit limitation is that the EPA must provide prior notice to authorized states. Withdrawal of authorization for a state program is an "extreme" and "drastic" step that requires the EPA to establish a federal program to replace the cancelled state program. Nothing in the text of the statute suggests that such a step is a prerequisite to EPA enforcement or that it is the only remedy for inadequate enforcement.

Id. at 1238-39 (citations omitted).

The Tenth Circuit's decision in this case, that RCRA permits "overfiling," conflicts therefore with the Eighth Circuit

decision in *Harmon* that RCRA prohibits "overfiling." Accordingly, this Court should grant the petition for writ of certiorari and resolve this conflict.

II

THE PETITION SHOULD BE GRANTED BECAUSE THE DECISION BELOW AUTHORIZES EPA TO USURP THE ENFORCEMENT ROLE ASSIGNED TO THE STATES UNDER RCRA WHICH UNDERMINES THE FUNDAMENTAL CONCEPT OF FEDERAL AND STATE COOPERATION EMBODIED IN THE ACT AND NULLIFIES THE CLEAR CONGRESSIONAL INTENT TO RELY ON STATE ENFORCEMENT STRATEGIES

Among the objectives Congress listed for RCRA is:

> [E]stablishing a viable Federal-State partnership to carry out the purposes of this chapter and insuring that the Administrator will, in carrying out the provisions of subchapter III of this chapter, give a high priority to assisting and cooperating with States in obtaining full authorization of State programs under subchapter III of this chapter.

42 U.S.C. § 6902(a)(7) (Appendix E).

Subchapter III of RCRA details the Hazardous Waste Management Program and delineates the process for state authorization. The Act states: "Such State is authorized to carry out such program in lieu of the Federal program." 42 U.S.C. § 6926(b). Put another way, the effect of state authorization is that "[a]ny action taken by a state under a hazardous waste program [by an authorized state] shall have the same force and effect as action taken by the Administrator." 42 U.S.C. § 6926(d).

But notwithstanding the congressional directive to establish a federal-state partnership and the clearly stated

deference EPA is to give authorized states, EPA seems to believe its mandate for cooperation evaporates once a state is certified. This is evident from the insidious practice of EPA to usurp state enforcement decisions to seek its own enforcement goals.

In their article, *The Federal and State Roles in Environmental Enforcement: A Proposal for More Effective and More Efficient Relationship*, 14 Harv. Envtl. L. Rev. 7, Hubert H. Humphrey and LeRoy C. Paddock recount the EPA's history of "overfiling" under numerous environmental laws, including the CAA, the CWA, and RCRA. According to the authors, one of whom was Attorney General of the State of Minnesota, "overfiling" is disruptive to state enforcement programs in a number of ways. Primarily, "overfiling" increases the reluctance on the part of regulated entities to deal only with state enforcement officials. Obviously, if EPA can override the state, regulated entities cannot be certain that a compliance schedule or a penalty amount agreed to by the state is final. One result is that states may find it harder to reach settlements with regulated entities. Humphrey, *supra*, at 13-14. At best, this is counterproductive. At worst, it unnecessarily delays the resolution of a cleanup action to the ultimate injury of the people and the environment.

Another result is that unilateral enforcement by EPA breeds distrust between federal and state enforcement officials. Indeed, the very act of "overfiling" is a breach of trust. Once a state is authorized to enforce the federal program, the state stands "in lieu" of EPA. This authorization is meaningless, however, if EPA can invade state enforcement authority whenever federal officials disagree with the state action. Moreover, this disagreement may not have anything to do with the state's substantive response to the environmental problem. So it was in this case.

Under RCRA, the state receives federal authorization only after satisfying the EPA that (1) the state program is equivalent to the federal program; (2) the state program is consistent with other state programs; and (3) the state program provides adequate enforcement of RCRA requirements. *See* 42 U.S.C. § 6926(b). Colorado met these exacting standards and received state authorization from EPA. At no time during the PEC incident did EPA question the state's ability to handle the investigation, cleanup, or resolution of the case. Nor did EPA question the state's fitness to keep its state authorization, although EPA has the power to withdraw such authorization:

> Whenever the Administrator determines after public hearing that a State is not administering and enforcing a program authorized under this section in accordance with requirements of this section, he shall so notify the State and, if appropriate corrective action is not taken within a reasonable time, not to exceed ninety days, the Administrator shall withdraw authorization of such program and establish a Federal program pursuant to this chapter.

42 U.S.C. § 6926(e).

Rather, EPA complained that CDPHE had not exacted its "pound of flesh" from PEC by requiring it to put up more money in the way of civil penalties and financial assurances. In effect, EPA made an end run around the authorization withdrawal process and simply overrode the state's enforcement strategy by filing its own civil action. The inconsistent federal suit not only demonstrated EPA's open disregard for the state's duly authorized RCRA enforcement program, but undermined Colorado's own enforcement goals.

This practice simply cannot be reconciled with the RCRA objective of establishing a federal-state partnership and relying on state enforcement to achieve the national goals of a cleaner and safer environment. To the contrary, it subverts that

objective and disrupts the state enforcement program. EPA enforcement under RCRA should be limited to those cases where the state is unwilling or incapable of enforcement altogether. If EPA enforcement goals are inconsistent with state enforcement objectives, EPA should withdraw state authorization and assume full responsibility for the hazardous waste program. For these reasons the petition should be granted.

III

THE PETITION SHOULD BE GRANTED BECAUSE THE IMPOSITION BY EPA OF AN INDEPENDENT AND CONFLICTING ENFORCEMENT STRATEGY IS CONTRARY TO THE GOALS OF RCRA AND THE EPA ITSELF

In his article, *State/Federal Enforcement of the Clean Air Act and Other Federal Pollution Laws: Federal Overfiling on State Enforcement Proceedings*, 1987 B.Y.U.L. Rev. 1085, Steven Cook examines whether the practice of "overfiling" by EPA helps the agency achieve its goals of deterrence, fair and equitable treatment of the regulated community, and rapid resolution of environmental problems. He concludes that, on balance, it does not.

To illustrate EPA's "overfiling" practices, Cook cites two cases wherein EPA filed an action for civil penalties after the parties had signed a consent decree with the state settling the cases: *United States v. Lehigh Portland Cement Co.*,1984 U.S. Dist. LEXIS 21366, No. C84 3030 (N.D. Iowa 1984), and *United States v. SCM Corp.*, 615 F. Supp. 411 (D. Md. 1985). Cook notes that the negotiations between the companies and the state were extensive and comprehensive and that EPA was aware of the negotiations but did not intervene until after settlement. He concludes that when EPA did take action, it was in utter disregard for the previous work of the parties and the overall effect of "overfiling" was to the detriment, rather than

in furtherance, of EPA's civil penalty objectives. Cook, *supra*, at 1088-90.

A. EPA "Overfiling" Has Only a Limited Deterrent Effect and Is Counterproductive

According to Cook, EPA "overfiling" policy is designed to persuade violators to take precautions against future violations and to deter others from committing violations. *Id.* at 1090. While acknowledging that "overfiling" has some deterrent effect, he concludes that the EPA's preference for exacting money damages inhibits environmental cleanup because it weakens the negotiating power of the state and diverts money from the state which can be used for local pollution control. For example, Utah once entered into a consent decree with Pacific States Cast Iron Pipe Company over CAA violations. In lieu of a $50,000 fine, Pacific States agreed to install additional air pollution equipment not required by law. Cook believes this approach is superior to the EPA money damages approach in that the former deters similar violations because the violator must spend substantial sums for the equipment and the equipment cleans up the pollution—something a check to the treasury cannot do. *Id.* at 1092. "If EPA insists on monetary damages in a situation such as with Pacific States, it restricts a state's ability to impose equitable, non-monetary remedies." *Id.* at 1093. In the present case, CDPHE chose to forego financial assurances from PEC, apparently confident in the knowledge that it could enforce its compliance orders and that the money that would be applied toward the assurances would best be used for the cleanup itself.

This Court recognized a phenomenon similar to Pacific States in a case called *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation*, 484 U.S. 49 (1987). In *Gwaltney*, this Court considered whether the citizen suit provision in the CWA authorized citizen suits for wholly past violations. This Court determined the Act did not confer such jurisdiction. Concluding that the citizen suit provision of the CWA was

intended to support the government's enforcement program and not displace it, this Court suggested a hypothetical to make its point. Suppose, this Court said, the Administrator of EPA identified a violator and issued a compliance order. *Id* at 60. "Suppose further that the Administrator agreed not to assess or otherwise seek civil penalties on the condition that the violator take some extreme corrective action, such as to install particularly effective but expensive machinery, that it otherwise would not be obliged to take." *Id.* at 60-61. "If citizens could file suit, months or years later, in order to seek the civil penalties that the Administrator chose to forgo, then the Administrator's discretion to enforce the Act in the public interest would be curtailed considerably." *Id.* at 61.

So it is with "overfiling." If EPA can file a suit, after the state resolves a RCRA action, as it did in this case, in order to seek exactions the state chose to forgo, then the state's discretion to enforce RCRA in the public interest would be curtailed considerably.

B. EPA "Overfiling" Is Unfair and Inequitable to the Regulated Community

With respect to whether "overfiling" achieves the goal of fair and equitable treatment of the regulated community, Cook is pointed:

> While overfiling may conserve EPA's enforcement resources, it is actually a duplication of effort and wastes limited enforcement dollars. EPA's efforts do not produce additional facts or other pertinent information necessary to bring additional actions against other pollution sources. Instead, EPA recycles the same data and creates the illusion that it is leading the way in cracking down on the nation's polluters. As a result, while federal and state agencies are pursuing one violator, other known or suspected violators are left outside the enforcement

> umbrella due to lack of money and insufficient personnel to pursue additional cases. Any money that is collected will end up in the general fund and will not create any additional funds for enforcement purposes. Consequently, the goal of fair and equitable treatment of the regulated community is not achieved as violators are either receiving a double blow or escaping untouched.

Cook, *supra*, at 1094-95.

C. EPA "Overfiling" Interferes with Swift Resolution of Environmental Problems

In his article, Cook ascertains three reasons why EPA "overfiling" does not advance the goal of rapid resolution of environmental problems. First, the speed and effectiveness with which a state can respond to a pollution problem is hampered by "overfiling" because subsequent negotiations with EPA can delay implementation of remedial measures agreed to by the state and the violator. *Id.* at 1095. Second, "overfiling" discourages early settlement because incentives for a violator to negotiate early with the state are diminished by the knowledge that the EPA may have to be satisfied later. *Id.* at 1096. And third, "overfiling" undermines state credibility with the regulated community because the violator cannot rely on its negotiations with the state to conclude the matter. This can handicap efforts to reach quick settlements. *Id.*

According to Cook:

> Overfiling fails to promote swift resolution in any measurable way. Federal efforts merely duplicate the state's actions by requiring the violator to go through a second set of negotiations. This new round of negotiations usually produces no additional benefit to the environment.

Id. at 1095.

In summary, Cook maintains that while "overfiling" has some deterrent effect, it fails to acknowledge the needs and goals of the state program, violators are treated unequally, and resolution is delayed because the state's credibility is eroded. He suggests, moreover, that EPA's goals can be better accomplished through increased cooperation with the states. *Id.* at 1101. Humphrey and Paddock agree. They conclude that federal "overfiling" results in redundant enforcement efforts, introduces uncertainty into the state enforcement program, saps the limited enforcement resources of state and federal agencies, undermines and disrupts the federal-state working relationships, and conflicts with the historical role of the state in addressing environmental problems. Humphrey, *supra*, at 39. If environmental compliance programs are going to work in the long run, there must be greater reliance on state and local enforcement. EPA "overfiling," after a violator has negotiated a good faith settlement with the state, is counterproductive and should not be allowed. As Humphrey and Paddock realized:

> Twenty years ago, one of the main reasons for an increased federal role in environmental protection was the inadequacy of state programs, including state enforcement. Today, allowing states and, in some cases, local governments, to reassume a greater enforcement role may be the only way to ensure an effective enforcement presence among the tens of thousands of regulated entities that now exist in each state. Strong, well-focused enforcement efforts designed to address the varying types of regulated entities in each state are necessary to obtain high levels of voluntary compliance without which the vast regulatory programs will not succeed.

Id. at 36-37.

CONCLUSION

EPA "overfiling" is contrary to the RCRA objective to establish a viable federal-state partnership. "Overfiling" undermines that partnership and robs the state of meaningful enforcement discretion—discretion it was given when it was authorized to stand in the stead of EPA and enforce its own hazardous waste program. Moreover, the practice of "overfiling" does not advance the EPA's enforcement goals. To the contrary, "overfiling" results in redundant enforcement efforts, introduces uncertainty into state enforcement programs, wastes public and private resources, and conflicts with the historical and statutory role of states in dealing with local environmental problems. Moreover, the decision of the Tenth Circuit in this case, validating the EPA's practice of "overfiling," is in direct conflict with the Eighth Circuit's decision in *Harmon Industries*.

For these reasons, this Court should grant the Petition for Writ of Certiori and overrule the decision below.

DATED: January, 2003.

Respectfully submitted,

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Appendix A-1

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

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479-3011

November 14, 2002

Mr. M. Reed Hopper
10360 Old Placerville Road
Suite 100
Sacramento, CA 95827

Re: Power Engineering Company, et al.
v. United States
Application No. 02A393

Dear Mr. Hopper:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Breyer, who on November 14, 2002, extended the time to and including January 17, 2003.

This letter has been sent to those designated on the attached notification list.

Sincerely,

WILLIAM K. SUTER, Clerk

By /s/ Ruth Jones

Ruth Jones
Assistant Clerk

Appendix A-2

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

WILLIAM K. SUTER
CLERK OF THE COURT

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479-3011

NOTIFICATION LIST

Mr. M. Reed Hopper
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Hon. Theodore B. Olson
Solicitor General
Department of Justice
Washington, DC 20530

Clerk
United States Court of Appeals for
the Tenth Circuit
Byron White Courthouse
1823 Stout Street
Denver, CO 80257

Appendix B-1

303 F.3d 1232, 2002 U.S. App. LEXIS 18263,
54 ERC (BNA) 1993

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. POWER ENGINEERING COMPANY; REDOUBT, LTD.; RICHARD J. LILIENTHAL, Defendants-Appellants, AMERICAN IRON AND STEEL INSTITUTE; AMERICAN PETROLEUM INSTITUTE; CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA; ENVIRONMENTAL FEDERATION OF OKLAHOMA; MICHIGAN MANUFACTURERS ASSOCIATION; NATIONAL ASSOCIATION OF MANUFACTURERS; WESTERN STATES PETROLEUM ASSOCIATION; STATE OF MAINE; STATE OF ARKANSAS; STATE OF CALIFORNIA; STATE OF CONNECTICUT; STATE OF ILLINOIS; STATE OF MONTANA; STATE OF NEW YORK; STATE OF VERMONT; STATE OF WEST VIRGINIA, Amici Curiae.

No. 01-1217

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

303 F.3d 1232; 2002 U.S. App. LEXIS 18263;
54 ERC (BNA) 1993

September 4, 2002, Filed

PRIOR HISTORY:
Appeal from the United States District Court for the District of Colorado. (D. Ct. No. 97-B-1654).

DISPOSITION:
Affirmed.

COUNSEL:
John F. McBride (Robert T. McAllister of Robert T. McAllister, P.C., Denver, Colorado, with him on the briefs), Denver, Colorado, appearing for Appellant.

Robert H. Oakley, Attorney, Department of Justice, Washington, DC (John C. Cruden, Acting Assistant Attorney General, Environment & Natural Resources Division, John W. Suthers, United States Attorney, John A. Bryson and John N. Moscato, Attorneys, Department of Justice, Washington, DC; and Stephen D. Taylor, Assistant United States Attorney, and Thomas Sitz, Office of Enforcement, Compliance and Environmental Justice, Environmental Protection Agency, Denver, Colorado, with him on the brief), appearing for Appellee.

G. Steven Rowe, Attorney General, and John H. Edwards, Assistant Attorney General, Natural Resources Division, State of Maine, Department of the Attorney General, Augusta, Maine; Mark Pryor, Attorney General, State of Arkansas, Little Rock, Arkansas; Bill Lockyer, Attorney General, State of California, San Diego, California; Richard Blumenthal, Attorney General, State of Connecticut, Hartford, Connecticut; James E. Ryan, Attorney General, State of Illinois, Chicago, Illinois; Mike McGrath, Attorney General, State of Montana, Helena, Montana; Eliot Spitzer, Attorney General, State of New York, New York, New York; William H. Sorrell, Attorney General, State of Vermont, Montpelier, Vermont; and Darrell V. McGraw, Jr., Attorney General, State of West Virginia, Charleston, West Virginia, filed an amicus curiae brief in support of the United States Environmental Protection Agency.

Scott M. DuBoff, Wright & Talisman, P.C., Washington, DC; Thomas M. Sneeringer, Washington, DC, Counsel for American Iron and Steel Institute; G. William Frick and Ralph

J. Colleli, Jr., Washington, DC, Counsel for American Petroleum Institute; Stephan A. Bokat and Robin S. Conrad, National Chamber Litigation Center, Inc., Washington, DC, Counsel for Chamber of Commerce of the United States; James Barnett, Kerr, Irvine, Rhodes & Ables, Oklahoma City, Oklahoma, Counsel for Environmental Federation of Oklahoma; Frederick R. Damm, Clark Hill, P.L.C., Detroit, Michigan, Counsel for Michigan Manufacturers Association; Jan Amundson, Washington, DC, Counsel for National Association of Manufacturers; Gregory McClintock and Brian Wall, Mayer, Brown & Platt, Los Angeles, California, Counsel for Western States Petroleum Association, filed an amicus curiae brief in support of Appellants Power Engineering Company, et al.

JUDGES:

Before TACHA, Chief Circuit Judge, BALDOCK, and LUCERO, Circuit Judges.

OPINION BY:

TACHA

OPINION:

TACHA, *Chief Circuit Judge*: The State of Colorado brought an enforcement action against defendants Power Engineering Company, Redoubt Limited, and Richard Lilienthal (collectively referred to as "PEC") for violations of the Colorado Hazardous Waste Management Act. Plaintiff United States, acting on behalf of the Environmental Protection Agency ("EPA"), filed its own lawsuit against PEC for the same violations, seeking financial assurances. The district court denied PEC's motion for summary judgment, finding that the EPA's lawsuit was not barred by statute or by res judicata. We

exercise jurisdiction pursuant to 28 U.S.C. § 1292(a)(1) and AFFIRM.

I. Background

Power Engineering Company has operated a metal refinishing and chrome electroplating business in Denver, Colorado since 1968. Redoubt Limited owns land and buildings leased and used by Power Engineering. Richard Lilienthal is an officer of both Power Engineering and Redoubt, as well as the sole shareholder of both companies. Each month Power Engineering produces over 1000 kilograms of waste, including arsenic, lead, mercury, and chromium. This waste is covered by the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§ 6901-6992k, and is defined as "hazardous." After the Colorado Department of Public Health and Environment ("CDPHE") learned of a discharge of hexavalent chromium into the Platte River, it conducted inspections of PEC and discovered that chromium emanating from PEC was contaminating the groundwater. It also found that PEC treated, stored, and disposed of hazardous wastes without a permit. CDPHE issued a notice of violation on June 11, 1993, and an Initial Compliance Order in July 1994. CDPHE issued a Final Administrative Compliance Order on June 13, 1996, requiring PEC to comply with hazardous waste laws, implement a cleanup plan for chrome-contaminated soil, conduct frequent inspections, and submit periodic reports.

PEC failed to comply with this order, and CDPHE issued an Administrative Penalty Order on December 23, 1996, assessing civil penalties of $ 1.13 million. When PEC refused to pay the penalties, CDPHE brought suit in state court to force compliance with both orders. The Colorado state court found on March 23, 1999, that the Final Administrative Compliance Order and the Administrative Penalty Order were enforceable as a matter of law.

Before CDPHE issued its Final Administrative Compliance Order, the EPA had requested that CDPHE enforce RCRA's financial assurance requirements against PEC. The EPA notified CDPHE that it would bring its own enforcement action if CDPHE failed to do so. When CDPHE did not demand financial assurances, the EPA filed its own suit against PEC.

The EPA and PEC filed cross-motions for summary judgment. PEC argued that the RCRA statute and res judicata barred the EPA from "overfiling"—which has been defined in this context as "the EPA's process of duplicating enforcement actions." *Harmon Indus. v. Browner*, 191 F.3d 894, 898 (8th Cir. 1999). The district court granted summary judgment for the EPA and held that PEC must provide $2,119,044 in financial assurances and obtain liability coverage for accidental occurrences. PEC appeals the district court's grant of summary judgment.

II. Discussion

We review the grant of summary judgment de novo, applying the same standard as the district court. *Wark v. United States*, 269 F.3d 1185, 1187 (10th Cir. 2001). Summary judgment is appropriate when there is no genuine issue of material fact, viewing the evidence in the light most favorable to the nonmoving party. *Id.*

A. Permissibility of Overfiling

PEC contends that the district court erred in not following the Eighth Circuit's interpretation of RCRA in Harmon. Under RCRA, a state may apply to the EPA for authorization to administer and enforce its own hazardous waste program if its program is equivalent to the federal program and provides adequate enforcement. 42 U.S.C. § 6926(b), (c). The Harmon court held that RCRA allows the EPA to overfile after

providing notice to the authorized state only if the EPA withdraws authorization or if the state fails to initiate an enforcement action. 191 F.3d at 899. We review the district court's construction of a statute de novo. *Foutz v. United States*, 72 F.3d 802, 804 (10th Cir. 1995).

A state program authorized pursuant to RCRA operates "in lieu of" the federal program. 42 U.S.C. § 6926(b). PEC contends that the "in lieu of" language renders the EPA powerless to file a separate lawsuit when a state has been authorized to run its own program and initiates its own enforcement action. The EPA disagrees and interprets RCRA in its regulations to allow such overfiling. 40 C.F.R. §§ 271.16(c) note, 271.19; *see also United States v. Power Eng'g Co.*, 125 F. Supp. 2d 1050, 1061 (D. Colo. 2000) (discussing the history and context of these regulations).

Because the EPA is charged with the administration of RCRA, *Chevron v. NRDC* guides our review of its interpretation of the statute. 467 U.S. 837, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984). Our first question is "whether Congress has directly spoken to the precise question at issue." 467 U.S. at 842. "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." 467 U.S. at 842-43. If the statute is "silent or ambiguous," however, we defer to the agency's interpretation "if it is based on a permissible construction of the statute." 467 U.S. at 843. More specifically, if there is "an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation," we must accept the agency's interpretation unless it is "arbitrary, capricious, or manifestly contrary to the statute." 467 U.S. at 843-44. Alternatively, if there is only an implicit delegation of authority to the agency, we must accept a "reasonable interpretation made by the administrator of [the]

agency." 467 U.S. at 844. After reviewing the statute, we conclude that it is ambiguous, and we defer to the agency interpretation.

The EPA argues that Congressional intent to allow overfiling is demonstrated by 42 U.S.C. § 6928(a), which conditions EPA enforcement only on providing notice to an authorized state: "The [EPA] Administrator may issue an order assessing a civil penalty for any past or current violation . . . . The Administrator shall give notice to the State in which such violation has occurred prior to issuing an order or commencing a civil action under this section." As another circuit court held, "Read in context, section [6928(a)] . . . simply conditions the exercise of [federal] authority on the provision of prior notice." *Wyckoff Co. v. EPA*, 796 F.2d 1197, 1201 (9th Cir. 1986).

The EPA finds support for this interpretation in RCRA's citizen suit provision, which explicitly limits authority for citizen suits. This provision states, "No [citizen suit] may be commenced . . . if the [EPA] or State has commenced and is diligently prosecuting a civil or criminal action . . . ." 42 U.S.C. § 6972(b)(1). No similar language is included in section 6928, which only requires notice. "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Brown v. Gardner*, 513 U.S. 115, 120, 130 L. Ed. 2d 462, 115 S. Ct. 552 (1994). Because Congress explicitly prohibits citizens from duplicating a federal or state RCRA action in section 6972(b)(1), but omits such language from section 6928, the statute suggests that Congress intended to prohibit duplicative citizen suits but not duplicative federal suits.

PEC argues, however, that several provisions of RCRA support its interpretation that RCRA unambiguously prohibits

overfiling. PEC relies largely on section 6926(b), which provides that, once a state's hazardous waste program has been approved under RCRA, "such State is authorized to carry out such program in lieu of the Federal program under this subchapter in such State and to issue and enforce permits . . . ." 42 U.S.C. § 6926(b). PEC argues that, because an authorized state program operates "in lieu of" the federal program, the EPA may not file an enforcement action after a state has done so. The linchpin of PEC's argument "'is that the term 'program' in § 6926 incorporates the exclusive responsibility to enforce criminal provisions penalizing the disposal of hazardous wastes.'" "'*United States v. Elias*, 269 F.3d 1003, 1009 (9th Cir. 2001) (quoting *United States v. MacDonald & Watson Waste Oil Co.*, 933 F.2d 35, 44 (1st Cir. 1991)). The statute, however, does not define the term "program," and the meaning of the term is ambiguous. *Wyckoff Co. v. EPA*, 796 F.2d 1197, 1200 (9th Cir. 1986). The EPA argues that "program" refers only to the administration of the regulatory program, and not to enforcement. It argues that section 6926(b) simply provides that once authorization has taken place, state requirements replace federal requirements, because the state requirements may be more stringent. *Cf.* 40 C.F.R. § 271.1(i) (allowing states to adopt more stringent and extensive requirements than the federal requirements).

The wording of section 6926(b) lends support to the EPA's interpretation. *Power Eng'g*, 125 F. Supp. 2d at 1059. The administration of authorized state programs and the enforcement of state regulations are addressed in separate clauses of the relevant sentence: "[An authorized] State is authorized to carry out [its] program in lieu of the Federal program under this subchapter in such State and to issue and enforce permits for the storage, treatment, or disposal of hazardous waste . . . ." 42 U.S.C. § 6926(b) (emphasis added). Because "in lieu of" appears in the first clause rather than the second, the language can reasonably be interpreted as saying

that the state is authorized to carry out its program in lieu of the federal program, and that the state is authorized to issue and enforce permits. *Power Eng'g*, 125 F. Supp. 2d at 1059. If enforcement were considered part of carrying out a program, the second clause would be superfluous, and we cannot "construe a statute in a way that renders 'words or phrases meaningless, redundant, or superfluous.'" *Id.* at 1059 (quoting *Proctor & Gamble Co. v. Haugen*, 222 F.3d 1262, 1272 (10th Cir. 2000)).

The only other circuit court of which we are aware that has directly addressed the question acknowledged that "the EPA is correct that the 'in lieu of' language refers to the program itself." *Harmon*, 191 F.3d at 899. The Harmon court nonetheless found that "the administration and enforcement of the program are inexorably intertwined." *Id.* at 899. This interpretation fails to account for the placement of "enforcement" and "in lieu of" in separate clauses of section 6926(b), and it does not adequately consider the structure of the statute. Section 6926 addresses the administration and enforcement of state regulations by authorized states, while the federal enforcement of such regulations is addressed in a different part of the statute—section 6928. Given this statutory structure, the EPA's conclusion that administration and enforcement of RCRA are not inexorably intertwined—and that authorization of a state program therefore does not deprive the EPA of its enforcement powers—is not unreasonable. *See also Power Eng'g*, 125 F. Supp. 2d at 1059.

Even if we were to find that administration and enforcement were inexorably intertwined, we could only reach the Harmon court's ultimate holding by "harmonizing" different sections of the statute:

> Harmonizing the section 6928(a)(1) and (2) language that allows the EPA to bring an enforcement action in

> certain circumstances with section 6926(b)' [sic n1] provision that the EPA has the right to withdraw state authorization if the state's enforcement is inadequate manifests a congressional intent to give the EPA a secondary enforcement right in those cases where a state has been authorized to act that is triggered only after state authorization is rescinded or if the state fails to initiate an enforcement action.

191 F.3d at 899. This interpretation goes well beyond the plain language of the statute. While Harmon correctly states that section 6928(a) limits the EPA's right to bring an enforcement action to "certain circumstances," the only explicit limitation is that the EPA must provide prior notice to authorized states. 42 U.S.C. § 6928(a)(2). Withdrawal of authorization for a state program is an "extreme" and "drastic" step that requires the EPA to establish a federal program to replace the cancelled state program. *Waste Mgmt., Inc. v. EPA*, 714 F. Supp. 340, 341 (N.D. Ill. 1989). Nothing in the text of the statute suggests that such a step is a prerequisite to EPA enforcement or that it is the only remedy for inadequate enforcement.

----------Footnotes----------

n1 Section 6926(e), rather than section 6926(b), allows for withdrawal of authorization. Section 6926(b) states when the EPA may deny a state's application for authorization.

----------End Footnotes----------

PEC also relies upon section 6926(d) in support of its position that the statute does not allow overfiling. That section provides:

Effect of a State permit

> Any action taken by a State under a hazardous waste program authorized under this section shall have the same force and effect as action taken by the [EPA] under this subchapter.

42 U.S.C. § 6926(d). The Harmon court, construing "the Act as a whole," found that this section applies broadly to any action authorized under this subchapter, including enforcement:

> The state authorization provision substitutes state action (not excluding enforcement action) for federal action. It would be incongruous to conclude that the RCRA authorizes states to implement and administer a hazardous waste program "in lieu of" the federal program where only the issuance of permits is accorded the same force and effect as an action taken by the federal government .... Nothing in the statute suggests that the "same force and effect" language is limited to the issuance of permits but not their enforcement.

191 F.3d at 900. According to this interpretation, the statute substitutes state enforcement action for EPA enforcement action and therefore does not permit an EPA lawsuit when a state has initiated an enforcement suit. This interpretation reads too much into the provision. The provision must be read in the context of the language and design of the statute as a whole. *United States v. Thompson*, 287 F.3d 1244, 1249 (10th Cir. 2002). Section 6926 addresses the authorization of state programs, not federal enforcement. The heading of subsection 6926(d) also suggests that the provision is more limited. While the title of a statutory subsection "is not part of the law itself ... it can be used to interpret an ambiguous statute." *United States v. Glover*, 52 F.3d 283, 286 (10th Cir. 1995). Again, it

is ambiguous whether "program" includes enforcement. *Wyckoff*, 796 F.2d at 1200. The statutory heading, "Effect of a State permit," suggests that this subsection only intends for state permits to have the "same force and effect" as federal permits.

In our judgment, limiting the "same force and effect" language to the issuance of permits is not "incongruous" with RCRA as a whole. *Harmon*, 191 F.3d at 900. It would be reasonable to conclude that Congress simply intended for section 6926(d) [to clarify that recipients of state-issued permits need not obtain a permit from the EPA. *Power Eng'g*, 125 F. Supp. 2d at 1060; see also 42 U.S.C. § 6925(a) ("The Administrator shall promulgate regulations requiring each person owning or operating an existing facility or planning to construct a new facility for the treatment, storage, or disposal of hazardous waste identified or listed under this subchapter to have a permit issued pursuant to this section."). Thus, it is reasonable to conclude that while subsection 6926(d) prevents the EPA from denying the effect of a state permit, it does not prevent the EPA from taking action when a violation occurs.

PEC also argues that the language of the citizen suit provision supports its interpretation. That provision states that no citizen suit may be brought if "the [EPA] Administrator or State" is diligently pursuing a lawsuit. 42 U.S.C. § 6972(b)(1) (emphasis added). PEC contends that the choice of the word "or" instead of "and/or" indicates that Congress did not contemplate competing actions between the EPA and an authorized state. *Harmon*, 191 F.3d at 901. This distinction is ambiguous at most. The word "and" is unnecessary in this context, because the statute clearly states that a lawsuit by either entity is sufficient to bar a citizen suit. Even without the word "and," the statute clearly prohibits citizen suits when both the EPA and a state are diligently pursuing an action.

In sum, PEC's position is arguably supported by the "in lieu of" and "same force and effect" language of section 6926, as well as the "or" instead of "and/or" language of section 6972(b)(1). On the other hand, PEC's interpretation contradicts the plain language of section 6928, the wording of section 6926(b), and the structure of the statute. Moreover, PEC's result is only reached by "harmonizing" sections 6928 and 6926 in a rather strained manner. Given these ambiguities and contradictions, we find that Congress has not "directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842. Because RCRA is ambiguous regarding whether EPA overfiling is permissible, we must defer to the EPA" reasonable interpretation "even if we would have reached a different result had we construed the statute initially." *Wash. Dep't of Ecology v. EPA*, 752 F.2d 1465, 1469 (9th Cir. 1985); *see Chevron*, 467 U.S. at 843 n.11. We find that the EPA's interpretation of RCRA has substantial support in the text of the statute and is therefore a reasonable interpretation of the statute.

B. Res Judicata

PEC next argues that the EPA's lawsuit is barred by the doctrine of res judicata. The question of application of res judicata to the facts, viewed in the light most favorable to the nonmoving party, is a pure question of law to be reviewed de novo. *Plotner v. AT & T Corp.*, 224 F.3d 1161, 1168 (10th Cir. 2000).

"Under res judicata, a final judgment on the merits bars further claims by parties or their privies based on the same cause of action." *Montana v. United States*, 440 U.S. 147, 153, 59 L. Ed. 2d 210, 99 S. Ct. 970 (1979). The Colorado lawsuit ended in a final judgment on the merits for CDPHE based on a cause of action under RCRA. It is disputed, however, whether the EPA was in privity with CDPHE and whether the EPA,

which sought only financial assurances, brought the same cause of action as the CDPHE.

Privity requires "at a minimum, a substantial identity between the issues in controversy and showing that the parties in the two actions are really and substantially in interest the same." *Lowell Staats Min. Co. v. Philadelphia Elec. Co.*, 878 F.2d 1271, 1275 (10th Cir. 1989). In general, "state and federal governments are separate parties for res judicata purposes, so that litigation by one does not bind another." 18 Charles Alan Wright, et al., Federal Practice and Procedure, § 4458, at 503. The Supreme Court has stated that "to bind the United States when it is not formally a party, it must have a laboring oar in a controversy." *Drummond v. United States*, 324 U.S. 316, 318, 89 L. Ed. 969, 65 S. Ct. 659 (1945). The United States has such a "laboring oar" when it "assumes control over litigation." *Montana*, 440 U.S. at 154. In *Montana*, such control was demonstrated by the fact that the United States had:

(1) required the [] lawsuit to be filed;

(2) reviewed and approved the complaint;

(3) paid the attorneys' fees and costs;

(4) directed the appeal from State District Court to the Montana Supreme Court;

(5) appeared and submitted a brief as amicus in the Montana Supreme Court;

(6) directed the filing of a notice of appeal to this Court; and

(7) effectuated [the] abandonment of that appeal on advice of the Solicitor General.

Id. at 155. Here, none of these factors is present, and there is no evidence that the EPA directly "assumed control over the litigation."

PEC argues, however, that the EPA "pulled" the "laboring oar" earlier in the process, when it ceded authority to the state to operate programs "in lieu of" and "with the same force and effect" as the EPA. *Harmon*, 191 F.3d at 904. In support of its position, PEC relies on *Harmon* and *United States v. ITT Rayonier*, 627 F.2d 996, 1002-03 (9th Cir. 1980), both of which found privity where a state program operated "in lieu of" a federal program.

Even if we agreed that the "laboring oar" could be "pulled" by such a delegation of authority, *Harmon* and *Rayonier* are distinguishable from the present case, and we find no other authority that would allow us to find privity based on the tenuous connection presented here. Unlike the Eighth Circuit in Harmon, we have found that states act in lieu of the EPA only with respect to administration of the program and issuance of permits. The EPA's connection to the state's litigation is therefore more limited than in Harmon. In *Rayonier*, the court did not follow the laboring oar analysis. Instead, the court relied largely on the identical interests of the state agency and the EPA. 627 F.2d at 1003. The state agency maintained the same position as the EPA in the state proceedings, and the agency asserted that position "vigorously." *Id.* at 1003. Unlike the state agency in *Rayonier*, the CDPHE did not maintain the same position as the EPA, as it did not seek financial assurances as the EPA had requested. We therefore decline to extend the doctrine of privity to cover the situation in this case. The delegation of authority to the state agency was limited, and the two agencies had different interests. Because there is no privity, res judicata does not apply, and we need not consider whether the cause of action was the same in both cases.

III. Conclusion

We find that the RCRA statute is ambiguous, and we defer to the EPA's reasonable interpretation that RCRA allows EPA overfiling. We also find that the EPA and CDPHE were not in privity, making the res judicata doctrine inapplicable. We therefore AFFIRM the ruling of the district court.

Appendix C-1

125 F. Supp. 2d 1050

UNITED STATES OF AMERICA, Plaintiff, v. POWER ENGINEERING COMPANY, REDOUBT, LTD. and RICHARD J. LILIENTHAL, Defendants.

Civil Action No. 97-B-1654

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

125 F. Supp. 2d 1050; 2000 U.S. Dist. LEXIS 18381; 51 ERC (BNA) 1756; 31 ELR 20335

November 24, 2000, Decided
November 24, 2000, Filed

* * * *

COUNSEL:

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For RICHARD J. LILIENTHAL, defendant: Robert T. McAllister, McAllister & Murphy, P.C., Denver, CO U.S.A. John F.X. McBride, John Joseph Zodrow, Zodrow, et al., P.C., Denver, CO USA.

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JUDGES:

LEWIS T. BABCOCK, CHIEF JUDGE.

OPINION BY:

LEWIS T. BABCOCK

OPINION:

MEMORANDUM OPINION AND ORDER

Babcock, C.J.

Plaintiff moves for partial summary judgment on the question whether Defendants must post financial assurances under Colorado regulations. Plaintiff concedes that there are genuine issues of material fact regarding the proper amount of those financial assurances and, accordingly, summary judgment is inappropriate on that question. Defendants cross-move for summary judgment. The motions are adequately briefed, and argued. For the reasons set forth below, I grant Plaintiff's

motion, and deny Defendants' motion. Jurisdiction exists under 28 U.S.C. § 1331.

I.

The following facts are undisputed unless otherwise noted. From approximately 1968 to the present, Defendants have operated a metal refinishing/chrome electroplating business at 2525 South Delaware Street in Denver, Colorado (Facility). The business specializes in stripping and refinishing crankshafts, connecting rods, and rod journals for large diesel engines used in heavy equipment. The process of stripping produces thirteen different waste streams and more than 1000 kilograms of hazardous waste per month as defined under the Resource Conservation and Recovery Act (RCRA). *See* 42 U.S.C. § 6901 *et seq*. The wastes in these streams that exceed the regulatory toxicity standards include arsenic, lead, mercury, and hexavalent chromium contaminated material.

In 1986, Defendant Power Engineering Company (PEC) notified the Colorado Department of Public Health and the Environment (CDPHE) that it was a generator of four different types of hazardous waste, but neither listed chromium as a constituent part of the waste generated, nor indicated that Defendant PEC treated, stored, or disposed of the wastes at its South Delaware Street facility. In 1992, the CDPHE learned of a discharge into the Platte River of high levels of hexavalent chromium. Soon thereafter, the CDPHE began a series of compliance evaluation inspections that continued through 1994. As a result of these inspections, the CDPHE discovered that Defendant PEC had been treating, storing, and disposing of hazardous wastes without either the proper state or federal permits, or attaining "interim status" under 42 U.S.C. § 6925(e)(1) which allows continued operations during the pendency of an application for a federal permit. In addition, the CDPHE learned that chromium emanating from Defendant

PEC's place of business had contaminated groundwater both under, and under areas outside of, its place of business. On March 10, 1993, Defendant PEC notified the CDPHE that in addition to one of the wastes identified in its 1986 notification, it also generated five other hazardous wastes. On June 11, 1993, the CDPHE issued a notice of violation to Defendant PEC indicating that it had been improperly treating storing, and disposing of hazardous wastes.

In July 1994, the CDPHE issued an Initial Compliance Order, but stayed its execution so as to discuss the order with Defendants. These discussions took place from September 1994 to June 1996. In June 1996, the CDPHE issued a Final Administrative Compliance Order which requires Defendant PEC to: (1) immediately comply with applicable hazardous waste laws; (2) refrain from the treatment, storage, and disposal of hazardous wastes without obtaining Interim Status or the proper permit(s); (3) properly manage wastes; (4) submit for review and approval plans for weekly inspections of hazardous waste containers; (5) submit a complete 1990/1991 Biennial Report reflecting all hazardous wastes generated, treated, stored, and disposed of during those years; (6) submit an updated 1992/1993 Biennial Report including waste codes applicable to off-site disposal; (7) implement the "Removal Plan for Chrome Contaminated Stockpiled Soils"; (8) submit for review and approval a soil characterization and groundwater sampling work plan; (9) submit for review and approval a corrective measure study plan evaluating remedial alternatives to prevent, mitigate, and remediate the releases from the Facility; and (10) within thirty days of CDHPE approval of the corrective measure study, implement the remedial alternative.

Defendant PEC did not appeal this order, but also failed to implement its requirements. Consequently, the CDPHE issued an Administrative Penalty Order assessing civil penalties of

$1.13 million. When Defendant PEC also failed to comply with the Administrative Penalty Order, the CDPHE brought suit in state court on August 1, 1997 seeking to force Defendant PEC to comply with both the Final Administrative Compliance Order, and the Administrative Penalty Order. *See* Plaintiff's Cross-Motion for Summary Judgment, Ex. A. On March 22, 1999, a Colorado state court held that the Final Administrative Compliance Order, and the Administrative Penalty Order are enforceable as a matter of law. *See id.*, Ex. D.

Although the CDPHE had the authority to demand financial assurances, the Final Administrative Compliance Order did not require them. Plaintiff asked the CDPHE to enforce the financial assurance requirements of the RCRA and corresponding Colorado regulations with respect to Defendants. Plaintiff also informed the CDPHE that if it did not, Plaintiff would seek its own enforcement action. *See* Plaintiff's Response, Ex. 8 (letter dated August 26, 1996 informing the CDPHE that its actions with respect to Defendant PEC had not been "timely and/or appropriate," and that unless the CDPHE so acted, Plaintiff would seek to enforce the RCRA itself); Plaintiff's Motion/or Summary Judgment, Ex. 25 (affidavit of Carol Rushin, Assistant Regional Administrator, Office of Enforcement, Compliance and Environmental Justice, EPA, that subsequent to the August 26, 1996 letter Plaintiff informed the CDPHE that its failure to seek financial assurances was inappropriate). Because the CDPHE failed to so act, and because Plaintiff believed Defendant Lilienthal was seeking to divest himself of, or otherwise insulate, his assets and might "leave the country, declare bankruptcy, or liquidate Defendant PEC," Plaintiff filed this action on August 1, 1997. Plaintiff alleged eight claims: (1) treatment of hazardous waste without a permit or interim status; (2) disposal of hazardous waste without a permit or interim status; (3) shipment of hazardous waste to an un-permitted facility; (4) improper container management; (5) storage of hazardous waste without a permit

or interim status; (6) failure to provide employee training; (7) failure to have a hazardous waste contingency plan; and (8) illegal operations (failure to have a groundwater monitoring program, failure to have a closure plan, failure to minimize releases of hazardous waste, and failure to obtain and provide financial assurances for closure and post-closure). Plaintiff also alleged that Power Engineering has failed to comply with CDPHE's Administrative Compliance Order.

After a preliminary injunction hearing at which Walter Avramenko, a CDPHE employee, testified that Colorado supports Plaintiff's action to obtain financial assurances, I granted Plaintiff's motion for preliminary injunction on June 10, 1998, and ordered Defendants to "provide financial assurance in the amount of $3,500,000 pursuant to 6 COLO. CODE REGS. 1007-3 § 266 and all applicable subparts." *U.S. v. Power Engineering Co.*, 10 F. Supp. 2d 1145, 1165 (D. Colo. 1998). On July 22, 1998, Defendants appealed my June 10, 1998 ruling. On August 17, 1998, after a dispute over the form the financial assurances would take, I ordered Defendants to post "a surety bond guaranteeing payment into a closure and/or post closure trust fund" pursuant to 6 COLO. CODE REGS. 1007-3 § 266.14(f). *U.S. v. Power Engineering Co.*, 10 F. Supp. 2d 1165, 1172 (D. Colo. 1998). On September 24, 1998, I modified the August 17, 1998 Memorandum Opinion and Order so that Defendants could provide financial assurances in accordance with any subpart of Section 266 if Plaintiff so agreed.

On October 15, 1998, Defendants filed a Show Cause Submittal arguing that "they are not able to obtain financial assurances in the amount of Three Million Five Hundred Thousand Dollars because there is no third party willing to extend credit to Defendants to secure the obligations of a third party financial institution issuing such financial assurances." Plaintiff opposed the Show Cause Submittal, and moved to both

hold Defendants in contempt, and impose sanctions. On November 24, 1998, Defendants moved to modify the preliminary injunction. In that motion, Defendants claimed that the $3,500,000 estimate of the cost of remediation undertaken at the May 11-13, 1998 hearing was inaccurate. Instead, Defendants claimed that "based upon the work performed by PEC and its consultants after the May hearing, the information now available to PEC, and the current plans for remediation of contaminated groundwater and soils," the cost of remediation would only be $ 575,500. Defendants thus moved to modify my June 10, 1998 Memorandum Opinion and Order to require Defendants to provide financial assurances of only $575,500.

On February 25, 1999, Plaintiff moved for partial summary judgment on the question of the liability of Defendants. On March 17, 1999, Defendants responded to Plaintiff's motion, and cross-moved for summary judgment. The central basis for Defendants' cross-motion is that Plaintiff does not have the authority to "overfile" a state enforcement action. Overfiling is nowhere defined by statute or regulation but is said to occur when the federal government initiates an enforcement action after a state government begins an action on the same matter.

On July 13, 1999, I denied without prejudice Defendants' motion to modify preliminary injunction, and Plaintiff's motion for partial summary judgment. In that order, I stated that "the opinion of the Tenth Circuit will probably have material bearing upon the issues remaining, including the issues raised by the parties in their motions for summary judgment. It is likely that further briefing on the motions for summary judgment will be required, in light of the Tenth Circuit's opinion on appeal."

On September 8, 1999, the Tenth Circuit issued its decision. *See U.S. v. Power Eng'g Co.*, 191 F.3d 1224 (10th Cir. 1999). In that decision, the Tenth Circuit did not decide the "overfile" issue raised by Defendants in their cross-motion.

Instead, it merely "assumed without deciding . . . that the EPA may [overfile] even after the state has taken its own enforcement actions." *Id.* at 1229. On January 19, 2000, Defendants filed a petition for writ of certiorari in the United States Supreme Court which was denied on April 24, 2000.

On September 11, 2000, both parties filed a joint stipulation regarding amendment of complaint, and briefing schedule for summary judgment in which they requested that: (1) Plaintiff be permitted to amend its complaint to eliminate all of its claims except that regarding financial assurances; (2) the motion for partial summary judgment, and cross-motion for summary judgment be withdrawn; and (3) both parties be permitted to file new Rule 56 motions. After I approved the joint stipulation the parties filed their present cross-motions for summary judgment.

II.

Rule 56 provides that summary judgment shall be granted if the pleadings, depositions, answers to interrogatories, admissions, or affidavits show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The very purpose of a summary judgment motion is to assess whether a trial is necessary. *White v. York Int'l Corp.*, 45 F.3d 357, 360 (10th Cir. 1995). A party seeking summary judgment bears the initial responsibility of informing the court of the basis for its motion, and identifying those portions of the pleadings, depositions, interrogatories, and admissions on file together with affidavits, if any, that demonstrate the absence of genuine issues for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986); *Mares v. ConAgra Poultry Co., Inc.*, 971 F.2d 492, 494 (10th Cir. 1992).

Once a properly supported summary judgment motion is made, the non-moving party has the burden of showing that issues of undetermined material fact exist. *Celotex*, 477 U.S. at 322. In so doing, the opposing party may not rest on the allegations contained in the complaint, but must respond with specific facts showing the existence of a genuine factual issue to be tried. *Otteson v. United States*, 622 F.2d 516, 519 (10th Cir. 1980); Fed. R. Civ. P. 56(e). These specific facts may be shown "by any of the kinds of evidentiary materials listed in Rule 56(c), except the mere pleadings themselves." *Celotex*, 477 U.S. at 324. Unsupported allegations "without any significant probative evidence tending to support he complaint" are insufficient, *White*, 45 F.3d at 360 (internal quote and citation omitted), as are conclusory assertions that factual disputes exist. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). Where, as here, the parties file cross motions for summary judgment, I assume that no evidence need be considered other than that filed by the parties. *James Barlow Family Ltd. Partnership v. David M Munson, Inc.*, 132 F.3d 1316, 1319 (10th Cir. 1997). Nevertheless, summary judgment is inappropriate if genuine issues of material fact exist. *Id.*

In ruling on summary judgment, I must view the factual record and reasonable inferences therefrom in the light most favorable to the nonmoving party. *See id.* If no reasonable juror could find for the non-moving party based on the evidence present in the motion and response, then summary judgment is proper and a trial is unnecessary. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986). Summary judgment should not enter if a reasonable trier of fact could return a verdict for the nonmoving party. *Liberty Lobby*, 477 U.S. at 252; *Mares*, 971 F.2d at 494.

III.

A.

In their cross-motion, Defendants argue that Plaintiff's Amended Complaint must be dismissed because: (1) subject matter jurisdiction does not exist; (2) the Eighth Circuit's reasoning in *Harmon Indus., Inc. v. Browner*, 191 F.3d 894 (8th Cir. 1999) that the RCRA prohibits "overfiling" is applicable here; and (3) the doctrine of res judicata precludes Plaintiff's action. Plaintiff responds that: (1) subject matter jurisdiction exists under 28 U.S.C. §§ 1331, 1345; (2) *Harmon* is distinguishable on its facts, and incorrectly decided; and (3) res judicata is inapplicable. I address each question in turn.

1.

Defendants' argument that 28 U.S.C. §§ 1331, 1345 do not confer subject matter jurisdiction is unpersuasive. 28 U.S.C. § 1331 states: "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." Under Tenth Circuit authority, "[a] case 'arises' under the laws of the United States if it clearly and substantially involves a dispute or controversy respecting the validity, construction or effect of such laws which is determinative of the resulting judgment." "*Mountain Fuel Supply Co. v. Johnson*, 586 F.2d 1375, 1381 (10th Cir. 1978), *cert. denied*, 441 U.S. 952, 60 L. Ed. 2d 1058, 99 S. Ct. 2182 (1979) (citing *Shulthis v. McDougal*, 225 U.S. 561, 56 L. Ed. 1205, 32 S. Ct. 704 (1912)). As discussed in detail below, this case involves a "controversy respecting the [] construction or effect" of the RCRA "which is determinative of the resulting judgment." *Mountain Fuel Supply*, 586 F.2d at 1381. Consequently, I have subject matter jurisdiction pursuant to Section 1331.

28 U.S.C. § 1345 also provides subject matter jurisdiction. Section 1345 states "the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States." 28 U.S.C. § 1345. As a leading treatise states, "no subject matter jurisdiction difficulties are presented when the United States is the plaintiff in an action in the federal courts," Wright et al., Federal Practice and Procedure § 3651 at 208 (3d ed. 1998), unless "the government [] lend[s] its name to a lawsuit merely for the benefit of a private individual." *Id.* at 213. If there is any question regarding the interest involved, the operative inquiry is whether the United States is "litigating []in order to assure the proper implementation of one of the government's policies and programs." *Id.* at 215.

Here, the United States is the Plaintiff, and Defendant does not contend that Plaintiff has brought this action "merely for the benefit of a private individual." *Id.* at 213. Even if Defendant did so argue, it is indisputable that Plaintiff is "litigating [] in order to assure the proper implementation of one of the government's policies and programs." *Id.* at 215. Consequently, I will not dismiss this case for lack of subject matter jurisdiction.

2.

The next question is whether the *Harmon* decision applies to this case, and if so, whether the Eighth Circuit correctly interpreted the RCRA.

a.

Under the RCRA, States can apply to the Environmental Protection Agency (EPA) for authorization to administer and enforce their own hazardous waste programs after they promulgate regulations consistent with the RCRA's requirements. See 42 U.S.C. § 6926 (b). If authorization is

granted, the "state is authorized to carry out such program in lieu of the Federal program under this subchapter . . . and to issue and enforce permits for the storage, treatment, or disposal of hazardous waste." *Id.* In a subsection of Section 6926 entitled "Effect of State permit," the RCRA states: "Any action taken by a State under a hazardous waste program authorized under [the RCRA] [has] the same force and effect as action taken by the [EPA] under this subchapter." 42 U.S.C. § 6926(d). Once the EPA authorizes a state, however, authorization can be withdrawn only when the Administrator [of the EPA] determines after public hearing that [the] State is not administering and enforcing a program authorized under [the RCRA] in accordance with requirements of [the RCRA], he [] so notifies the State and, [] appropriate corrective action is not taken within a reasonable time, not to exceed ninety days. 42 U.S.C. § 6926. Under Section 6928(a)(2), the EPA retains the power to independently address "violations [of the RCRA that] occur[] in [] State[s] which [are] authorized to carry out a hazardous waste program under section 6926 of this title "by "commencing a civil action under this section" provided "the Administrator [first] give[s] notice to the State in which such violation has occurred." 42 U.S.C. § 6928(a)(2).

In *Harmon*, the EPA filed an administrative enforcement action against Harmon Industries, Inc. (Harmon Industries) seeking a monetary penalty for violation of the RCRA. *Harmon*, 191 F.3d at 897. At the same time, Harmon Industries negotiated with the State of Missouri regarding the same violations. *Id.* During the pendency of the EPA's court action, Harmon Industries and the State of Missouri reached a settlement which released Harmon Industries from any monetary penalty. *Id.* A Missouri State court subsequently approved the consent decree. *Id.* The EPA then successfully pursued their enforcement action through the administrative process, and Harmon Industries appealed to federal court.

In reversing the administrative enforcement action, the Eighth Circuit first defined "overfiling" as "the EPA's process of duplicating enforcement actions." *Harmon*, 191 F.3d at 898. The *Harmon* court then held that the EPA can undertake its own enforcement action after providing notice to an authorized state only if either the authorized state fails to initiate an enforcement action, or the Federal Government withdraws authorization. *Id.* at 899 (upon giving notice, the EPA may pursue an enforcement action "only after State authorization is rescinded or if the state fails to initiate an enforcement action"). Because the State of Missouri had undertaken its own enforcement action and the EPA did not withdraw the State's authorization, the Eighth Circuit dismissed the EPA's action.

Here, Plaintiff's action does not duplicate the action undertaken by the CDPHE. The CDPHE's enforcement action did not obtain financial assurances, and Defendants have not cited any provision of either the Final Administrative Compliance Order, or the Administrative Penalty Order that releases Defendants from the RCRA's requirement of financial assurances. Under the Eighth Circuit's definition, therefore, Plaintiff's action here does not constitute an "overfiling."

This does not end the analysis because the Eighth Circuit's ruling prohibits the EPA from acting when a state takes "any" enforcement action, irrespective of whether an EPA suit duplicates any part of the state's action. *See id.* at 899 ("If the state fails to initiate any action, then the EPA may institute its own action."); 901 ("the federal government's right to pursue an enforcement action under the RCRA attaches only when a state's authorization is revoked or when a state fails to initiate any enforcement action") (emphases added). Because Defendants rely on *Harmon's* expansive holding in their cross-motion, *Harmon's* factual distinctions arguably have no bearing on the applicability of the Eighth Circuit's legal

interpretation of the RCRA to this case. Consequently, I turn next to the *Harmon* court's interpretation of the RCRA.

b.

i.

"'Where, as here, resolution of a question of federal law turns on a statute and the intention of Congress, [I] look first to the statutory language'" to determine whether it either has a plain meaning or is ambiguous. *Gudenkauf v. Stauffer Communications, Inc.*, 158 F.3d 1074, 1079 (10th Cir. 1998) (quoting *Blum v. Stenson*, 465 U.S. 886, 896, 79 L. Ed. 2d 891, 104 S. Ct. 1541 (1984)). "'The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.'" *Id.* (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 136 L. Ed. 2d 808, 117 S. Ct. 843 (1997)). "[My] inquiry must cease if the statutory language is unambiguous and 'the statutory scheme is coherent and consistent.'" *Robinson*, 519 U.S. at 340 (quoting *U.S. v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 240, 103 L. Ed. 2d 290, 109 S. Ct. 1026 (1989)).

If the statutory language is ambiguous and Congress has charged an agency to administer the statute, however, I must "defer to the agency's interpretation, if it is a permissible one." *Southern Utah Wilderness Alliance v. Dabney*, 222 F.3d 819, 824 (10th Cir. 2000) (citing *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984)). "The Supreme Court has 'long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer.'" *Rivera-Jimenez v. INS*, 214 F.3d 1213, 1218 (10th Cir. 2000) (quoting *Chevron*, 467 U.S. at 844). *See Udall v. Tallman*, 380 U.S. 1, 16, 13 L. Ed. 2d 616,

85 S. Ct. 792 (1965) (noting that courts must give "great deference" to the interpretations of agencies). Nevertheless, "the judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent." *Chevron*, 467 U.S. at 843 n.9. "An agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view." *INS v. Cardoza Fonesca*, 480 U.S. 421, 447 n.30, 94 L. Ed. 2d 434, 107 S. Ct. 1207 (1987) (quoting *Watt v. Alaska*, 451 U.S. 259, 273, 68 L. Ed. 2d 80, 101 S. Ct. 1673 (1981)). *But see Christensen v. Harris County*, 529 U.S. 576, 120 S. Ct. 1655, 1662, 146 L. Ed. 2d 621 (2000) ("Interpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant Chevron-style deference.").

The Harmon court's interpretation of the RCRA derives from the conclusion that the "in lieu of" language contained in [Section 6926(b)] reveals a congressional intent for an authorized state program to supplant the federal hazardous waste program in all respects including enforcement. "*Harmon*, 191 F.3d at 899 (emphasis added). In reaching this conclusion, the Eighth Circuit conceded that the "in lieu of" language in Section 6926(b) refers to the regulations promulgated by authorized states. *See id.* at 898-99 ("According to the EPA, the phrase 'in lieu of' refers to which regulations are to be enforced in an authorized state .... The EPA is correct that the 'in lieu of' language refers to the program itself."). Nevertheless, the Harmon court determined that the "in lieu of" language must also apply to the enforcement of state regulations because "the administration and enforcement of the [regulations] are inexorably intertwined." *Id.*

Based on this foundational conclusion, the Eighth Circuit held that the plain language of Section 6928(a)(2)—that the Administrator of the EPA can file an enforcement action in an authorized state after giving notice to that state—cannot be given its plain meaning when it is interpreted within the context of the entire Act." *Id.* *See id.* (indicating that the Harmon court was conducting a "plain language" analysis of the RCRA). The Harmon court considered Section 6928(b) together with the "in lieu of" language of Section 6926(b), and the "'same force and effect language' of section 6926(d)," and concluded that the Federal Government can initiate an action under Section 6928(a)(2) after providing notice to an authorized state only if either the authorized state fails to initiate an enforcement action, or the Federal Government withdraws authorization. *Id.* at 899. *See* 42 U.S.C. § 6928(a)(2) ("in the case of a violation of any requirement of this subchapter where such violation occurs in a State which is authorized to carry out a hazardous waste program under section 6926 of this title, the Administrator shall give notice to the State in which such violation has occurred prior to issuing an order or commencing a civil action under this section"); 42 U.S.C. § 6926(d) ("any action taken by a State under a hazardous waste program authorized under this section shall have the same force and effect as action taken by the Administrator"). Accordingly, under *Harmon*, the notice requirement of section 6928(a)(2) "reinforces the primacy of a state's enforcement rights under RCRA," and thereby justifies appending restrictions on the EPA's enforcement power not found explicitly in any part of the statute. *Harmon*, 191 F.3d at 899.

With all due respect, I conclude that the *Harmon* decision incorrectly interprets the RCRA. As an initial matter, the plain meaning of Section 6926's "in lieu of" language is that an authorized state's regulations supplant those of the Federal Government, as the Harmon court conceded. *See Harmon*, 191 F.3d at 899. It is questionable, however, that "the

administration and enforcement of the program are inexorably intertwined" under the RCRA. *Id.* Indeed, while Section 6926 primarily addresses the administration and enforcement of state regulations by authorized states, Section 6928 concerns the federal enforcement of such regulations. The very structure of the RCRA suggests, therefore, that the administration and enforcement of state regulations are not inexorably intertwined."

The structure of the sentence containing the "in lieu of" language also suggests that Congress did not intend "in lieu of" to apply to enforcement. Section 6926(b) states that an authorized state "is authorized to carry out [its] program in lieu of the Federal program under this subchapter in such State and to issue and enforce permits for the storage, treatment, or disposal of hazardous waste." 42 U.S.C. § 6926(b) (emphasis added). Because the administration of state authorized programs, and the enforcement of state regulations are addressed in separate clauses, the structure of Section 6926(b) indicates Congress' intent that administration and enforcement are not "inexorably intertwined."

In addition, the plain language of Section 6926(b) indicates that the "in lieu of" appearing in the first clause does not modify the second clause in which the question of enforcement is explicitly addressed. *Harmon's* interpretation of the contested sentence in Section 6926(b) renders the second clause superfluous. If the "'in lieu of' language contained in [Section 6926(b)] reveals a congressional intent for an authorized state program to supplant the federal hazardous waste program in all respects including enforcement," *Harmon*, 191 F.3d at 899 (emphasis added), Congress would have had no reason to include the second clause granting enforcement powers to authorized states. Because I cannot "construe a statute in a way that renders words or phrases meaningless, redundant, or superfluous,'" *Proctor and Gamble Co. v.*

Haugen, 222 F.3d 1262, 1272 (10th Cir. 2000) (quoting *Bridger Coal Co./Pac. Minerals, Inc. v. Director, Office of Workers' Compensation Programs*, 927 F.2d 1150, 1153 (10th Cir. 1991), I cannot adopt the *Harmon* decision's interpretation. *See also Hohn v. U.S.*, 524 U.S. 236, 249, 141 L. Ed. 2d 242, 118 S. Ct. 1969 (1998) ("We are reluctant to adopt a construction making another statutory provision superfluous") (citations omitted). Consequently, the plain language of the RCRA does not support one of the main foundations upon which the *Harmon* decision is built—that the "'in lieu of' language contained in [Section 6926(b)] reveals a congressional intent for an authorized state program to supplant the federal hazardous waste program in all respects including enforcement." *Id.* (emphasis added).

ii.

Undermining this foundation has profound effects on the rest of the conclusions in *Harmon*. *Harmon* held that the EPA can undertake its own enforcement action after providing notice to an authorized state only if either the authorized state fails to initiate an enforcement action, or the Federal Government withdraws authorization. 191 F.3d at 899. As the *Harmon* court acknowledged, however, this conclusion is not derived from the plain language of the RCRA, but is reached only by "harmonizing" Sections 6926(b) and 6928(a). *Id.* Such harmonization is achieved only if the "'in lieu of' language contained in [Section 6926(b)] reveals a congressional intent for an authorized state program to supplant the federal hazardous waste program in all respects including enforcement." *Id.* (emphasis added). If the plain language of the RCRA does not indicate that federal enforcement authority has been "supplant[ed]" by state authority in authorized states, then there is no reason to impose restrictions on federal authority not found explicitly in the statute.

Moreover, it is not necessarily inconsistent to conclude that Section 6928(a)(2)'s notice requirement both "reinforces the primacy of a state's enforcement rights under RCRA," and allows the EPA to institute enforcement actions after providing notice. It is reasonable to conclude that Congress included the notice requirement to minimize the likelihood of duplicative actions. The notice requirement achieves this end by providing authorized states with the opportunity to incorporate the remedies or claims identified by the EPA into either new or existing enforcement actions before the EPA institutes its own action.

The *Harmon* court's interpretation of Section 6926(d) similarly rests on a flawed interpretation of Section 6926(b). Under the heading "Effect of State permit," Section 6926(d) states that "any action taken by a State under a hazardous waste program authorized under this section shall have the same force and effect as action taken by the Administrator under this subchapter." In interpreting this subsection, the *Harmon* court stressed the "any action" language and stated

> The state authorization provision substitutes state action (not excluding enforcement action) for federal action. It would be incongruous to conclude that the RCRA authorizes states to implement and administer a hazardous waste program "in lieu of" the federal program where only the issuance of permits is accorded the same force and effect as an action taken by the federal government. . . . Nothing in the statute suggests that the "same force and effect" language is limited to the issuance of permits but not their enforcement. We believe that if Congress had intended such a peculiar result, it would have stated its preference in a clear and unambiguous manner.

Harmon, 191 F.3d at 900. Construing "the Act as a whole," *id.*, the *Harmon* court disregarded the title of Section 6926(d), and concluded that the subsection applies to enforcement actions.

Nevertheless, if "an authorized state program [does not] supplant the federal hazardous waste program in all respects including enforcement," *Harmon*, 191 F.3d at 899 (emphasis added), it is not necessarily "incongruous" or "peculiar" to conclude that Section 6926(d) applies only to the issuance of permits. *Id.* at 900. Instead, it is reasonable to conclude that Congress intended to restrict the effect of Section 6926(d) to state-issued permits because otherwise there could be doubt as to whether the recipient of a state permit also needs to obtain a permit from the EPA in accordance with Section 6925(a). *See* 42 U.S.C. § 6925(a) ("the Administrator shall promulgate regulations requiring each person owning or operating an existing facility or planning to construct a new facility for the treatment, storage, or disposal of hazardous waste identified or listed under this subchapter to have a permit issued pursuant to this section."). Accordingly, Congress' reference to "any action" within Section 6926(d) creates ambiguity in light of the rest of the statute.

The Supreme Court has held that "the title of a statute or section can aid in resolving an ambiguity in the legislation's text." *INS v. National Ctr. for Immigrants' Rights, Inc.*, 502 U.S. 183, 189, 116 L. Ed. 2d 546, 112 S. Ct. 551 (1991). *See Almendarez-Torres v. United States*, 523 U.S. 224, 234, 140 L. Ed. 2d 350, 118 S. Ct. 1219 (1998) ("'the title of a statute and the heading of a section' are 'tools available for the resolution of a doubt' about the meaning of a statute") (quoting *Brotherhood of R. Trainmen v. Baltimore & Ohio R. Co.*, 331 U.S. 519, 528-529, 67 S. Ct. 1387, 91 L. Ed. 1646 (1947)). The title of Section 6926(d)—"Effect of State permit"—indicates Congressional intent to limit the scope of Section 6926(d) to the permitting process. I conclude that such an interpretation is the

most reasonable because it both gives effect to every word of the statute, and does not necessitate harmonizing" Section 6928 by adding restrictions on the EPA's enforcement power not found in the plain language of that section.

iii.

The alternative holding in *Harmon* underscores a further fundamental problem with the outcome in that case. In that alternative holding, the *Harmon* court assumed ambiguity exists within the RCRA and interpreted the statute's legislative history to reach the same outcome. *See Garcia v. U.S.*, 469 U.S. 70, 76, n.3, 83 L. Ed. 2d 472, 105 S. Ct. 479 ("'resort to legislative history is only justified where the face of the [statute] is inescapably ambiguous'") (quoting *Schwegmann Brothers v. Calvert Distillers Corp.*, 341 U.S. 384, 395, 95 L. Ed. 1035, 71 S. Ct. 745 (1951) (concurring opinion)); *Oklahoma v. New Mexico*, 501 U.S. 221, 234 n.5, 115 L. Ed. 2d 207, 111 S. Ct. 2281 (1991) ("we repeatedly have looked to legislative history and other extrinsic material when required to interpret a statute which is ambiguous") (citations omitted). Yet the *Harmon* court gave short shrift to the EPA's interpretation of the RCRA under such circumstances. As the Supreme Court has stated,

> if a statute is silent or ambiguous with respect to the question at issue, our longstanding practice is to defer to the 'executive department's construction of a statutory scheme it is entrusted to administer,' *Chevron, supra*, 467 U.S. at 844, 104 S. Ct. at 2782, unless the legislative history of the enactment shows with sufficient clarity that the agency construction is contrary to the will of Congress.

Japan Whaling Ass'n v. American Cetacean Soc., 478 U.S. 221, 233, 92 L. Ed. 2d 166, 106 S. Ct. 2860 (1986). Accordingly,

the *Harmon* decision failed to consider properly the EPA's interpretation of the RCRA.

Under the EPA's interpretation, the only restriction on its authority to pursue enforcement actions independent of comparable state actions is that explicitly included in Section 6928(a)(2), the notice requirement. *See* 42 U.S.C. § 6928(a)(2) (before filing an enforcement action the EPA must "give notice to the State in which [the] violation has occurred."). 40 C.F.R. § 271.16(c) specifies that "a civil penalty assessed, sought, or agreed upon by the State Director under paragraph (a)(3) of this section shall be appropriate to the violation." In a "Note" to Section 271.16(c), the EPA states

> To the extent the State judgments or settlements provide penalties in amounts which EPA believes to be substantially inadequate in comparison to the amounts which EPA would require under similar facts, EPA, when authorized by applicable statute, may commence separate actions for penalties.

40 C.F.R. § 271.16(c). The language "when authorized by applicable statute" is included because the EPA settled a lawsuit challenging certain parts of its proposed consolidation of the requirements and procedures for separate state permit programs authorized under various statutes. The "Note" was part of the settlement and was intended to apply to three separate permit programs authorized under the RCRA, the Clean Water Act, and the Safe Drinking Water Act. *See* 47 FR 25546 (June 14, 1982). The settlement was contingent on the EPA "promulgating final rules [with respect to all three programs] which are substantially the same as these proposed rules" in the settlement. *Id.* at 25547 (emphasis added). The EPA did just that on September 1, 1983 by incorporating the "Note" without change into the regulations of all three programs. *See* 48 FR 39611 (September 1, 1983).

Consequently, the fact that the language "when authorized by applicable statute" is included in Section 271.16(c) indicates that the EPA had no doubt that "overfiling" is permissible under the RCRA.

Other regulations reflect EPA's statutory interpretation of the power to overfile. 40 C.F.R. § 271.19 states in relevant part:

> (e) Under Section 3008(a)(3) of RCRA, EPA may terminate a State-issued permit or bring an enforcement action in accordance with the procedures of 40 CFR Part 22 in the case of a violation of a State program requirement. In exercising these authorities, EPA will observe the following conditions:
>
> (1) The Regional Administrator may take action under section 3008(a)(3) of RCRA against a holder of a State-issued permit at any time on the ground that the permittee is not complying with a condition of that permit.
>
> (2) The Regional Administrator may take action under Section 3008(a)(3) of RCRA against a holder of a State-issued permit at any time on the ground that the permittee is not complying with a condition that the Regional Administrator in commenting on the permit application or draft permit stated was necessary to implement approved State program requirements, whether or not that condition was included in the final permit.
>
> (3) The Regional Administrator may not take action under section 3008(a)(3) of RCRA against a holder of a State-issued permit on the ground that the permittee is not complying with a condition necessary

> to implement approved State program requirements unless the Regional Administrator stated in commenting on the permit application or draft permit that the condition was necessary.
>
> (4) The Regional Administrator may take action under Section 7003 of RCRA against a permit holder at any time whether or not the permit holder is complying with permit conditions.

40 C.F.R. § 271.19 (emphases added). Although this regulation applies to Section 6928(a)(3) ("Any order issued [by the Administrator of the EPA] pursuant to this subsection may include a suspension or revocation of any permit issued by the Administrator or a State under this subchapter and shall state with reasonable specificity the nature of the violation"), it rejects the fundamental tenet of the *Harmon* decision that "an authorized state program supplant[s] the federal hazardous waste program in all respects including enforcement." *Harmon*, 191 F.3d at 899 (emphasis added). Under *Harmon's* reasoning, the EPA could not act under Section 6928(a)(3) unless it first revoked the authorization of the state within which the violation occurred. Sections 271.16(c) and 271.19 indicate EPA's belief that the only restrictions on its authority to bring enforcement actions are those explicitly stated in the RCRA. *See* 40 C.F.R. §§ 271.16(c), 271.19.

Defendants argue that I must disregard these regulations because a contemporaneous interpretation by the EPA of the RCRA conflicts with the interpretation found in 40 C.F.R. §§ 271.16(c), 271.19. *See* Defendants' Reply at 15-16 (citing *Watt v. Alaska*, 451 U.S. 259, 273, 68 L. Ed. 2d 80, 101 S. Ct. 1673 (1981) ("The Department's current interpretation, being in conflict with its initial position, is entitled to considerably less deference."). The alleged interpretation is found in testimony by an EPA Assistant Administrator, Thomas C. Jorling, before

the Senate Subcommittee of Resource Protection of the Committee on Environment and Public Works. The relevant exchange is as follows:

> Senator Randolph: Thank you very much.
>
> Two of out panelists, Mr. Wingerter and Mr. Plehn, I understand, will suggest that EPA grant only partial interim program authorization for those portions of the hazardous waste control program which a state can actually administer in an effective way. This would be in place of what we call the total interim authorization that I think you intend to give to states for any part of their program. What do you think of such an approach?
>
> Mr. Jorling: Mr. Chairman, when we get into the period of full implementation of the hazardous program, it is our view that that program is best conducted by one or the other level of government, either the State or the Federal. It is very hard to operate a program with segregated responsibility. It is a cohesive program of regulation; it is one that requires very close implementation of several pieces, so that our implementation, when we are in the full versus the interim period should be completely performed by one level of government. We would not have the benefit to the public by such segmented implementation by piecemeal implementation. It just becomes too great of a management task. Therefore, we support the concept of full authorization and full implementation of those responsibilities by the States.

"Resource Conservation and Recovery Act Oversight," Hearing before the Subcommittee of Resource Protection of the Senate Committee on Environment and Public Works, 95th Cong., 2d Sess. at 22 (Mar. 20, 1978) (testimony of Thomas C. Jorling).

In their reply, Defendants only reproduce Mr. Jorling's response to the question, and characterize its meaning as "once an authorized state program was fully implemented, hazardous waste regulation and enforcement would be conducted by *either* the Federal government or by the State governments, *but not both*." *Defendants' Reply* at 15 (emphasis in original).

I note first that Mr. Jorling did not explicitly address the question of enforcement in his answer. In addition, once both Mr. Jorling's response and the relevant question are considered together, it is clear that Mr. Jorling's answer, far from addressing the question of enforcement as Defendants maintain, concerns the manner in which "interim authorization" of a state's hazardous waste program under Section 6926(c) should be implemented. *See* 42 U.S.C. § 6926(c). Consequently, I will not disregard the EPA's interpretation of its enforcement authority in 40 C.F.R. §§ 271.16(c), 271.19 on the basis of Mr. Jorling's testimony. In any event, Defendants should have included Senator Randolph's query in their citation to Mr. Jorling's testimony, as their duty of candor requires.

Even if I were to accept that Mr. Jorling's testimony applied to the EPA's enforcement authority, the Supreme Court has held that "interpretations . . . [that] lack the force of law[]do not warrant Chevron-style deference. Instead, [such] interpretations . . . are 'entitled to respect' under our decision in *Skidmore v. Swift & Co.*, 323 U.S. 134, 140, 65 S. Ct. 161, 89 L. Ed. 124 (1944), but only to the extent that those interpretations have the 'power to persuade.'" *Christensen*, 120 S. Ct. at 1657 (citations omitted). It is indisputable that Mr. Jorling's Senate testimony "lack[s] the force of law." I conclude, therefore, that the above testimony has no "power to persuade" with respect to Defendants' proposed interpretation thereof in light of the full context of the testimony, and the EPA's regulations concerning the scope of their enforcement powers. *See id.* ("Of course, the framework of deference set

forth in Chevron does apply to an agency interpretation contained in a regulation."). Accordingly, Mr. Jorling's testimony does not trump the EPA's interpretation of 40 C.F.R. §§ 271.16(c), 271.19.

I also will not disregard the EPA's interpretation because it is "contrary to the will of Congress." *Japan Whaling Ass'n*, 478 U.S. at 233. Defendants primarily rely on two separate provisions of a report published by the House of Representatives regarding a preliminary version of the RCRA:

> This legislation permits the states to take the lead in the enforcement of the hazardous wastes [sic] laws. . . . Although the Administrator is required to give notice of violations of this title to the states with authorized hazardous waste programs the Administrator is not prohibited from acting in those cases where the state fails to act, or from withdrawing approval of the state hazardous waste plan and implementing the federal hazardous waste program pursuant to Title III of this act.
>
> . . . .
>
> The Administrator, after giving the appropriate notice to a state that is authorized to implement the state hazardous waste program, that violations of the Act are occurring and the state failing to take action against such violations, is authorized to take appropriate action against those persons in such state not in compliance with the hazardous waste title.

H. Rep. 1491, 94th Cong., 2d Sess. 31, 32 *reprinted in* 1976 U.S.C.C.A.N. 6238, 6269, 6270. Nevertheless, these provisions of the House Report do not explicitly prohibit Plaintiff's action here. After Plaintiff provided notice to CDPHE regarding the

RCRA remedies the CDPHE's preexisting enforcement action failed to address, Colorado "fail[ed] to act" with respect to those remedies.

I also note that Congress knew how to specifically prohibit enforcement action once any action is undertaken by a state. Section 6972 prohibits citizen suits to enforce the RCRA "if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States or a State to require compliance with such permit, standard, regulation, condition, requirement, prohibition, or order." 42 U.S.C. § 6972(b)(1)(B). Similar language was not included in Section 6928. "'Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" *Brown v. Gardner*, 513 U.S. 115, 120, 130 L. Ed. 2d 462, 115 S. Ct. 552 (1994) (quoting *Russello v. U.S.*, 464 U.S. 16, 23, 78 L. Ed. 2d 17, 104 S. Ct. 296 (1983)).

Defendants also cite statements by individual Senators purportedly supporting the proposition that "Congress recognized that hazardous waste regulation [is] essentially a local issue." Defendants' Response at 18 (citing, e.g., Senator Randolph's statement that "This legislation recognizes that solid waste is a uniquely local problem."). The text of the statute, however, indicates that Congress thought otherwise. *See* 42 U.S.C. § 6901(a)(4) ("The Congress finds with respect to solid waste . . . that while the collection and disposal of solid wastes should continue to be primarily the function of State, regional, and local agencies, the problems of waste disposal as set forth above have become a matter national in scope and in concern"); 42 U.S.C. § 6902(b) ("The Congress hereby declares it to be the national policy of the United States that, wherever feasible, the generation of hazardous waste is to be reduced or

eliminated as expeditiously as possible. Waste that is nevertheless generated should be treated, stored, or disposed of so as to minimize the present and future threat to human health and the environment.") (emphasis added). *See* also 42 U.S.C. § 6903(5) (emphasis added) ("The term 'hazardous waste' means a solid waste."). I cannot let the statements of individual Senators trump explicit statutory text. Under these circumstances, I will not conclude that "the legislative history of the enactment shows with sufficient clarity that the agency construction is contrary to the will of Congress." *Japan Whaling Ass'n*, 478 U.S. at 233.

iv.

Finally, the consequences of the *Harmon* decision support my view of Congressional intent in writing the RCRA. Consider an authorized state with an unblemished record of both complying with the RCRA and working cooperatively with the EPA that discovers significant pollution caused by a large industrial employer located within the authorized state but in close proximity to the border of at least one other state. Because the polluting entity employs a large number of the authorized state's citizens, and provides significant tax revenues to the authorized state, the authorized state is less than inclined to take the action mandated by the RCRA that might put the polluting employer at risk. Consequently, the authorized state, even after appeals from the EPA, takes minimal enforcement action against the polluting employer that protects the citizens of neither the authorized state nor the neighboring state(s). Under *Harmon's* analysis of the RCRA, EPA's only course of action would be to de-authorize the authorized state's entire hazardous waste program, notwithstanding the state's otherwise perfect record of enforcing the RCRA, in order to protect the citizens of the affected states. Based on the statute and legislative history, I find no evidence that Congress intended such an outcome.

For the foregoing reasons, and because Defendants do not dispute that Plaintiff provided the notice required by Section 6928(a)(2) to the CDPHE prior to commencing this action, *see* Plaintiff's Response, Ex. 8 (letter dated August 26, 1996 informing the CDPHE that its actions with respect to Defendant PEC had not been "timely and/or appropriate," and that unless the CDPHE so acted, Plaintiff would seek to enforce the RCRA itself); Plaintiff's Motion for Summary Judgment, Ex. 25 (affidavit of Carol Rushin, Assistant Regional Administrator, Office of Enforcement, Compliance and Environmental Justice, EPA, that subsequent to the August 26, 1996 letter Plaintiff informed the CDPHE that its failure to seek financial assurances was inappropriate), I conclude that the RCRA does not prohibit this action.

3.

I find unpersuasive Defendants' final argument that res judicata bars Plaintiff's claims here. In *Drummond v. U.S.*, 324 U.S. 316, 89 L. Ed. 969, 65 S. Ct. 659 (1945), the Supreme Court held that as a general matter "to bind the United States when it is not formally a party, it must have a laboring oar in a controversy." *Drummond v. U.S.*, 324 U.S. 316, 318, 89 L. Ed. 969, 65 S. Ct. 659 (1945). The United States has a "laboring oar" when it "assume[s] control over litigation," *Montana v. U.S.*, 440 U.S. 147, 154, 59 L. Ed. 2d 210, 99 S. Ct. 970 (1979), by "employing counsel to represent its interest . . . or otherwise actively aid[ing] in [the] conduct" of the litigation. *Drummond*, 324 U.S. at 318. In *Montana*, such control was evident because the United States:

(1) required the [] lawsuit to be filed;

(2) reviewed and approved the complaint;

(3) paid the attorneys' fees and costs;

(4) directed the appeal from State District Court to the Montana Supreme Court;

(5) appeared and submitted a brief as amicus in the Montana Supreme Court;

(6) directed the filing of a notice of appeal to this Court; and

(7) effectuated [the] abandonment of that appeal on advice of the Solicitor General.

Montana, 440 U.S. at 154. In the context of federal-state relations, one leading treatise concludes that "it is clear that state and federal governments are separate parties for res judicata purposes, so that litigation by one does not bind another." Wright, Federal Practice and Procedure, § 4458 at 503. Nevertheless, both *Harmon* and one other federal court has applied res judicata to a suit brought by the federal government after a state concluded a similar suit. *See U.S. v. ITT Rayonier, Inc.*, 627 F.2d 996 (9th Cir. 1980).

In my view, the *Harmon* decision results in an unsupported expansion of the doctrine of res judicata as it is applied to the federal government under existing Supreme Court authority. The *Harmon* court decided that because the RCRA "authorized the state to proceed 'in lieu of the federal government and 'with the same force and effect' as the federal government . . . . the 'laboring oar' is pulled on much earlier in the process . . . . when the EPA grants the state permission to enforce the EPA's interests through the state's own hazardous waste program." *Harmon*, 191 F.3d at 904. The *Harmon* court failed to cite any authority in which the federal government was deemed to have a "laboring oar" on the basis of a similarly attenuated connection, nor am I aware of any. Instead, the *Harmon* court cited generally to the Ninth Circuit's decision in *Rayonier*.

The *Rayonier* court, however, did not undertake the "laboring oar" analysis. The Ninth Circuit assessed whether the application of res judicata would "promote harmony and cooperation between courts." *Rayonier*, 627 F.2d at 1001. Because it does not address whether the Federal Government pulled a "laboring oar" in the state court proceedings, I find the *Rayonier* decision unpersuasive.

Rayonier is distinguishable for another reason. In *Rayonier*, the EPA authorized Washington State to issue permits under the Federal Water Pollution Control Act (FWPCA). Washington State then issued a permit to ITT Rayonier, Inc. that stated in "footnote f" that certain standards stated in the permit "will be modified to be consistent with the applicable final effluent when promulgated by the EPA in the Federal Register, or as thereafter modified by final action consequent upon any appeal from such guidelines." *Id.* at 999. In November 1975, the EPA notified Washington State that ITT Rayonier was not complying with new standards promulgated by the EPA that applied to ITT Rayonier under footnote f. Washington State issued a compliance order in December 1975 which was overturned by an intermediate state appellate court ruling that the new regulations did not apply to ITT Rayonier under footnote f. Soon thereafter, the EPA filed its own suit in federal court raising the same argument. The *Rayonier* court stated that "if the EPA is dissatisfied with state enforcement efforts or the lack thereof it can revoke permit-issuing authority or bring an independent action in federal court" *Id.* at 1002 (emphasis added). Because the "state court [] entered a final judgment on [the] identical issue" raised by the EPA in Federal court, the Ninth Circuit held that harmony and cooperation between state and federal courts would be best served if res judicata applied to the state court's decision. *See Rayonier*, 627 F.2d at 1001 ("Res judicata is a rule promoting harmony and cooperation between courts.").

Here, in contrast, the issue of financial assurances was not before the Colorado court. In addition, the CDPHE supports Plaintiff's pursuit of financial assurances. Plaintiff's Motion for Partial Summary Judgment, Ex. 1 at 235 (testimony of Walter Avramenko, a CDPHE employee, at preliminary injunction hearing on May 11, 1998 that Colorado supports Plaintiff's action to obtain financial assurances); Ex. 8 at para. 24 (affidavit of Mr. Avramenko dated June 13, 2000). Applying res judicata in this instance, therefore, would not "promote harmony and cooperation between courts," *Rayonier*, 627 F.2d at 1001, or between Colorado and the federal government. Instead, Plaintiff's suit here is precisely the type of "independent action" contemplated by the Ninth Circuit. *Id.* at 1002 ("if the EPA is dissatisfied with state enforcement efforts or the lack thereof it can revoke permit-issuing authority or bring an independent action in federal court") (emphasis added). *Rayonier* is distinguishable on its facts. Accordingly, I decline to follow either *Rayonier* or *Harmon*, and instead apply the Supreme Court's analysis in *Drummond* and *Montana*. Because Defendants offer no evidence that Plaintiff exercised the type of control over the CDPHE's state court action identified in *Drummond* and *Montana*, I will not conclude that Plaintiff pulled the "laboring oar," or otherwise controlled, the CDPHE's action in state court. *See Montana*, 440 U.S. at 154; *Drummond*, 324 U.S. at 318. For the foregoing reasons, the doctrine of res judicata does not apply to this case.

B.

In its motion for partial summary judgment, Plaintiff argues that Defendants are covered by the RCRA and that they treated, stored, and disposed of hazardous waste at their Facility in violation of the RCRA. In response, Defendants argue that: (1) financial assurances are no longer required because they are no longer actively violating the RCRA, Colorado statutes, or

regulations; (2) because they "made tremendous progress in remediating contaminated soils and groundwater at or around PEC's property, [and are] currently in compliance with the terms and conditions of the Compliance Order," Defendants' Response at 2, Plaintiff cannot establish an irreparable injury requiring a permanent injunction; (3) Defendant Lilienthal is not an "operator" of the Facility under Colorado regulations; and (4) the doctrine of laches bars this action. Again, I address each argument in turn.

1.

In their response to Plaintiff's motion for partial summary judgment, Defendants neither argue nor present any evidence that their past actions identified in detail by Plaintiff in its Motion for Partial Summary Judgment did not constitute treatment, storage, and disposal of hazardous waste at their Facility in violation of the RCRA and relevant state regulations. Defendants have also stipulated that under the RCRA and corresponding Colorado regulations the Facility is a "facility," and Defendants PEC and Redoubt are an "operator" and "owner," respectively, of the Facility. *See* Plaintiff's Motion for Partial Summary Judgment, Ex. 2 at paras. 13-16. *See also* 6 COLO. CODE REGS. 1007-3 §§ 260.10 ("The requirements of Sections 266.12, 266.14, and 266.16 through 266.17 applies [sic] to owners and operators of hazardous waste facilities, except as otherwise provided in this Section or in Section 264.1."); 266.14 ("An owner or operator of each facility, on the effective date of these regulations, must establish financial assurance for closure of the facility, and if applicable, post-closure financial assurance."). No genuine issue of material fact remains, therefore, regarding whether Defendants violated the RCRA and Colorado regulations, and Defendants PEC and Redoubt are subject to the RCRA and corresponding Colorado regulations. Consequently, summary judgment is appropriate on these questions.

2.

Defendants' argument that financial assurances are no longer required because they are no longer actively violating the RCRA, Colorado statutes, or regulations is unpersuasive. At the preliminary injunction stage of this case, Defendants made the same argument. *See U.S. v. Power Engineering Co.*, 10 F. Supp. 2d 1145, 1160-61 (D. Colo. 1998) (noting Defendants' argument that "the United States may not obtain financial assurances for past violations of RCRA."). As I held in my June 10, 1998 Memorandum Opinion and Order:

> Nothing within RCRA's "cradle-to-grave" regulatory scheme indicates that owners and operators of hazardous waste facilities are exempt from providing financial assurance requirements before remediation and closure is accomplished. To the contrary, the clear intent of federal and state regulations is for the financial assurance requirements to attach until remediation, closure, and, if necessary, post-closure care is assured. *See* 40 C.F.R. § 265.1(a) (standards for Interim Status facilities "define the acceptable management of hazardous waste during the period of interim status and until certification of final closure" (emphasis added)); *see also* 40 C.F.R. § 265.1(b) (Interim Status standards "apply . . . until either a permit is issued . . . or until applicable closure and post-closure responsibilities are fulfilled"); 6 COLO. CODE REGS. 1007-3 §§ 265.1(a) and (b).

Defendants' failure to disclose their treatment, storage, and disposal of hazardous waste does not now exempt them from the financial assurance requirements. The evidence shows that defendants were legally obligated to but did not file a permit application, seek interim status, or cease their activities of treatment, storage, and disposal. Like many of the facilities

operating before and after RCRA's effective date, the Facility is now somewhere between the cradle and grave. The recent discovery of defendants' previous unauthorized activities does not, at this juncture, relieve them from their legal obligation to provide financial assurances. To hold otherwise would be contrary to the expressed intent of Congress, the clear language of applicable regulations, and public policy. To reward defendants' past evasion of RCRA would encourage similar conduct by others.

Id. at 1161-62. Defendants attack, therefore, a holding that is the law of this case.

"The law of the case 'doctrine posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case.'" *U.S. v. Monsisvais*, 946 F.2d 114, 115 (10th Cir. 1991) (quoting *Arizona v. California*, 460 U.S. 605, 618, 75 L. Ed. 2d 318, 103 S. Ct. 1382 (1983)). "The doctrine is 'based on sound public policy that litigation should come to an end and is designed to bring about a quick resolution of disputes by preventing continued re-argument of issues already decided.'" *McIlravy v. Kerr-McGee Coal Corp.*, 204 F.3d 1031, 1035 (10th Cir. 2000) (quoting *Gage v. General Motors Corp.*, 796 F.2d 345, 349 (10th Cir. 1986) (citations omitted)). The doctrine is, however, "only a rule of practice in the courts and not a limit on their power." *Monsisvais*, 946 F.2d at 116 (citing *Messenger v. Anderson*, 225 U.S. 436, 444, 56 L. Ed. 1152, 32 S. Ct. 739 (1912)). The Tenth Circuit has recognized three "exceptionally narrow" grounds for departure from that rule of practice: "(1) when the evidence in a subsequent trial is substantially different; (2) when controlling authority has subsequently made a contrary decision of the law applicable to such issues; or (3) when the decision was clearly erroneous and would work a manifest injustice." *U.S. v. Alvarez*, 142 F.3d 1243, 1247 (10th

Cir.), *cert. denied*, 525 U.S. 905, 142 L. Ed. 2d 199, 119 S. Ct. 242 (1998) (citing *Monsisvais*, 946 F.2d at 117).

Here, Defendants have provided no reason why I should disregard my previous ruling. Accordingly, my June 10, 1998 holding that Plaintiff is permitted to obtain financial assurances for past violations of the RCRA is the law of the case.

3.

The thrust of Defendants' response to Plaintiff's motion for partial summary judgment is that they have "made tremendous progress in remediating contaminated soils and groundwater at or around PEC's property, [and are] currently in compliance with the terms and conditions of the Compliance Order." Defendants' Response at 2. Based on this "tremendous progress," Defendants argue that Plaintiff cannot establish the type of irreparable injury necessary to warrant the entry of permanent injunction at the summary judgment stage. I disagree.

Under Tenth Circuit authority,

> When the evidence shows that the defendants are engaged in, or about to be engaged in, the act or practices prohibited by a statute which provides for injunctive relief to prevent such violations, irreparable harm to the plaintiffs need not be shown.

Atchison, Topeka and Santa Fe Ry. v. Lennen, 640 F.2d 255, 259 (10th Cir. 1981) (per curiam). Further, "where an injunction is authorized by statute it is unnecessary for plaintiff to plead and prove the existence of the usual equitable grounds, irreparable injury and absence of an adequate remedy at law. It is enough if the requirements of the statute are satisfied." *Id.* at 260.

Here, "the financial assurance requirements [of the relevant statutes and regulations] attach until remediation, closure, and, if necessary, post-closure care is assured." *Power Engineering*, 10 F. Supp. 2d at 1161-62. Moreover, the RCRA specifically authorizes Plaintiff to seek injunctive relief. See 42 U.S.C. § 6928(a)(1). Because Defendants do not genuinely dispute that their previous treatment, storage, and disposal of hazardous waste at their Facility requires them to provide financial assurances, or that remediation is incomplete, they are currently in violation of the financial assurance requirements of the Colorado regulations. Consequently, "Defendants are engaged in . . . the act or practices prohibited by a statute which provides for injunctive relief to prevent such violations, [and consequently] irreparable harm to the plaintiffs need not be shown." *Atchison*, 640 F.2d at 259. I will not, therefore, deny Plaintiff's motion based on Defendants' allegations that they have made "tremendous progress" in the remediation of the Facility.

4.

I also find unpersuasive Defendant Lilienthal's argument that there are genuine issues of material fact as to whether he is an operator of the Facility. At all times relevant to this action, Defendant Redoubt owned the lands and buildings at the Facility, and leased both to Defendant PEC. Plaintiff's Motion for Partial Summary Judgment, Ex. 2 at para.6-7. At the time Plaintiff filed the initial complaint in this action, Defendant Lilienthal was the president of Defendants PEC and Redoubt, and owned 51% of the outstanding stock in both. *Id.*, Ex. 2 at para. 8. The Lilienthal Family Trust owned the remainder of the stock in both Defendant PEC and Redoubt. *See id.* Ex. 1 at 23. Plaintiff contends, and Defendants do not dispute, that Defendant Lilienthal now owns 100% of the outstanding stock in Defendant PEC. *Id.* at 13. Moreover, Defendants admit that Defendant "Lilienthal generally was involved in making

management decisions for [Defendants PEC and Redoubt], including decisions regarding environmental compliance matters." Amended Answer at para. 8.

Defendants' admission is supported by testimony from Defendant Lilienthal and others at Defendants PEC and Redoubt. In Defendant Lilienthal's deposition, the following exchange occurred:

> Q: Mr. Lilienthal, are you committed to clean up the Power Engineering property?
>
> A: I am still here. I haven't fled to Belize. I worked for my father since I was 17 years old. I know no other place, no other business. The property is a good property. My company is a good company I have people that have worked for me for over 40 years there. I have been trying to clean up my property for at least five years or more. I can get no direction. I can get no help. I can get no answers. I have paid multi-thousands of dollars out in lawyer fees.
>
> Yeah, I've done things wrong, probably filled out paperwork that was wrong. I didn't get the things done on time that I was supposed to. I stored some waste for a long time that I shouldn't have stored it. We hoped to reuse it and put it back in the tanks, which we could have done, but we had to ship it out.
>
> All I want to do is I want to clean the property up.

Plaintiff's Motion for Partial Summary Judgment, Ex. 1, at 445. In addition, Defendant PEC's comptroller, Daniel Frieson, testified as follows:

Q: I'm going to jump around a little bit again. With regard to environmental decisions at Power Engineering, those are decisions concerning what remediation to do, how fast to do it, when to do it. Do you make those decisions?

A: No.

Q: Who makes those decisions?

A: Dick Lilienthal.

Q: That would include decisions-to your knowledge, has Mr. Lilienthal involved himself in decisions regarding disposal of hazardous waste?

A: On a day to day basis?

Q: Yes sir.

A: I talk to Dick about getting set up with the facility. This facility actually talked to our health and safety manager, gave him a price. I looked at the price and said, Dick, this is what we came up with. Is this okay? Do you approve it? Well, he said, yes. So we don't ask him every shipment, does he approve that shipment? It's something—it's just part of our operation that's ongoing.

Q: For instance, if you were looking at facility cleanup, does Mr. Lilienthal have the ultimate authority to make a determination on how to clean up and how much money to spend?

A: Yes.

Q: And, in fact, does he exercise that authority?

A: Yes.

Q: PEC is a public corporation, is it not?

A: No, it's privately held.

Q: It's privately held. Essentially, is Mr. Lilienthal the person who holds controlling interest in PEC?

A: That's correct.

Q: As a person who holds controlling interest, he would have ultimate authority over its business decisions?

A: That's correct.

Q: Over its environmental decisions?

A: That's correct.

Q: Over the direction and tenor of its relationships with the Environmental Protection Agency or the State of Colorado Department of Health?

A: He is directly involved in it.

Id., Ex. 11 at 87-89.

Under Colorado regulations, "'operator' means the person operating a hazardous waste management facility or site either by contract or permit." 6 COLO. CODE REGS. § 260.10.

Courts have devised two tests to determine operator liability under the RCRA and state regulations. The "authority-to-control" test imposes operator liability "as long as one [entity] had the capability to control [another entity], even if it was never utilized." *Lansford-Coaldale Joint Water Auth. v. Tonolli Corp.*, 4 F.3d 1209, 1221 (3d Cir. 1993); *see also FMC Corp. v. Aero Indus.*, 998 F.2d 842, 846 (10th Cir. 1993) (citing cases) (noting that some courts treat those with authority to control a facility as operators regardless of whether they actually exercise that control). The "actual control" test, in contrast, considers whether a corporation exercised "substantial control" over the activities of another corporation which commits an environmental violation. *Lansford-Coaldale*, 4 F.3d at 1221; *see also FMC*, 998 F.2d at 846 ("Actual control and personal participation in the wrongful conduct clearly makes one an operator under CERCLA."); *U.S. v. Kayser-Roth Corp.*, 910 F.2d 24, 27 (1st Cir. 1990) (holding that to be an operator, a parent corporation must, at a minimum, be actively involved in its subsidiary's activities); *Mathews v. Dow Chem. Co.*, 947 F. Supp. 1517, 1526 (D. Colo. 1996) (citing cases) (recognizing that most courts impose operator liability upon one corporation for the acts of another corporation where the first corporation exercises "substantial control" over the second). Although these tests have been devised to determine whether an individual or entity is an "operator" under the Comprehensive Environmental Response Compensation and Liability Act, there is no reason not to apply them to the "operator" inquiry under the RCRA given the similarity of the definitions in both statutes. *See* 42 U.S.C.A. § 9601(20)(A) ("The term 'owner or operator' means . . . any person . . . operating such facility").

The Tenth Circuit has not chosen between the two tests, *see FMC*, 998 F.2d at 846 (identifying both approaches but holding that "we need not decide which approach is best because" the Defendant was liable under both), and neither do I. Under either test, Defendant Lilienthal is an "operator" of the

facility. Consequently, there is no genuine issue of material fact as to whether Defendant Lilienthal is an operator of the Facility.

5.

Finally, I reject Defendants' argument that there are "factual disputes as to whether laches bars Plaintiff's claims." Plaintiff's Response at 24. The Supreme Court has held that "laches or neglect of duty on the part of officers of the government is no defense to a suit by it to enforce a public right or protect a public interest." *Utah Power & Light Co. v. U.S.*, 243 U.S. 389, 409, 61 L. Ed. 791, 37 S. Ct. 387 (1917). *See Albrechtsen v. Andrus*, 570 F.2d 906, 910 (10th Cir.), *cert. denied*, 439 U.S. 818, 58 L. Ed. 2d 109, 99 S. Ct. 79 (1978) (citing *Utah Power & Light* and holding that "the Government is too vast, its operations too varied and intricate, to put it to the risk of losing that which it holds for the nation as a whole because of the oversight of subordinate officials."). Defendants state that no public interest is involved because "the interest sought to be protected by the Plaintiff in this case is the government's economic interest in having PEC pay for remedial activities." Defendants' Opposition at 20. If Defendants do not pay for remediation of the Facility, however, it is likely that the Government, and thus the public, will. I conclude, therefore, that Plaintiffs suit is "to . . . protect a public interest." *Utah Power & Light Co.*, 243 U.S. at 409. Summary judgment is appropriate against Defendants' claim that the doctrine of laches applies to this case.

Accordingly, IT IS ORDERED THAT

(1) Plaintiff's Motion for Partial Summary Judgment is GRANTED;

(2) Defendants' Motion for Summary Judgment is DENIED;

(3) Defendants are required to provide financial assurances for closure and postclosure care of the Facility and to post third-party assurances in a manner consistent with 6 COLO. CODE REGS. 1007-3 §§ 266 and all applicable subparts; and

(4) Plaintiff is AWARDED ITS COSTS.

Dated: November 24, 2000 in Denver, Colorado.

BY THE COURT:

LEWIS T. BABCOCK, CHIEF JUDGE

Appendix D-1

TITLE 42.
THE PUBLIC HEALTH AND WELFARE
CHAPTER 82. SOLID WASTE DISPOSAL
GENERAL PROVISIONS

42 USCS § 6901 (2002)

§ 6901. Congressional findings

(a) Solid waste.

The Congress finds with respect to solid waste—

(1) that the continuing technological progress and improvement in methods of manufacture, packaging, and marketing of consumer products has resulted in an ever-mounting increase, and in a change in the characteristics, of the mass material discarded by the purchaser of such products;

(2) that the economic and population growth of our Nation, and the improvements in the standard of living enjoyed by our population, have required increased industrial production to meet our needs, and have made necessary the demolition of old buildings, the construction of new buildings, and the provision of highways and other avenues of transportation, which, together with related industrial, commercial, and agricultural operations, have resulted in a rising tide of scrap, discarded, and waste materials;

(3) that the continuing concentration of our population in expanding metropolitan and other urban areas has presented these communities with serious financial, management, intergovernmental, and technical problems in the disposal of solid wastes resulting from the industrial, commercial, domestic, and other activities carried on in such areas;

(4) that while the collection and disposal of solid wastes should continue to be primarily the function of State, regional, and local agencies, the problems of waste disposal as set forth above have become a matter national in scope and in concern and necessitate federal action through financial and technical assistance and leadership in the development, demonstration, and application of new and improved methods and processes to reduce the amount of waste and unsalvageable materials and to provide for proper and economical solid waste disposal practices.

(b) Environment and health.

The Congress finds with respect to the environment and health, that—

(1) although land is too valuable a national resource to be needlessly polluted by discarded materials, most solid waste is disposed of on land in open dumps and sanitary landfills;

(2) disposal of solid waste and hazardous waste in or on the land without careful planning and management can present a danger to human health and the environment;

(3) as a result of the Clean Air Act [42 USCS §§ 7401 et seq.], the Water Pollution Control Act [33 USCS §§ 1251 et seq], and other Federal and State laws respecting public health and the environment, greater amounts of solid waste (in the form of sludge and other pollution treatment residues) have been created. Similarly, inadequate and environmentally unsound practices for the disposal or use of solid waste have created greater amounts of air and water pollution and other problems for the environment and for health;

(4) open dumping is particularly harmful to health, contaminates drinking water from underground and surface supplies, and pollutes the air and the land;

(5) the placement of inadequate controls on hazardous waste management will result in substantial risks to human health and the environment;

(6) if hazardous waste management is improperly performed in the first instance, corrective action is likely to be expensive, complex, and time consuming;

(7) certain classes of land disposal facilities are not capable of assuring long-term containment of certain hazardous wastes, and to avoid substantial risk to human health and the environment, reliance on land disposal should be minimized or eliminated, and land disposal, particularly landfill and surface impoundment, should be the least favored method for managing hazardous wastes; and

(8) alternatives to existing methods of land disposal must be developed since many of the cities in the United States will be running out of suitable solid waste disposal sites within five years unless immediate action is taken.

(c) Materials.

The Congress finds with respect to materials, that—

(1) millions of tons of recoverable material which could be used are needlessly buried each year;

(2) methods are available to separate usable materials from solid waste; and

(3) the recovery and conservation of such materials can reduce the dependence of the United States on foreign resources and reduce the deficit in its balance of payments.

(d) Energy.

The Congress finds with respect to energy, that—

(1) solid waste represents a potential source of solid fuel, oil, or gas that can be converted into energy;

(2) the need exists to develop alternative energy sources for public and private consumption in order to reduce our dependence on such sources as petroleum products, natural gas, nuclear and hydroelectric generation; and

(3) technology exists to produce usable energy from solid waste.

* * * *

Appendix E-1

TITLE 42. THE PUBLIC HEALTH AND WELFARE CHAPTER 82. SOLID WASTE DISPOSAL GENERAL PROVISIONS

42 USCS § 6902 (2002)

§ 6902. Objectives and national policy

(a) Objectives.

The objectives of this Act [42 USCS §§ 6901 et seq.] are to promote the protection of health and the environment and to conserve valuable material and energy resources by—

(1) providing technical and financial assistance to State and local governments and interstate agencies for the development of solid waste management plans (including resource recovery and resource conservation systems) which will promote improved solid waste management techniques (including more effective organizational arrangements), new and improved methods of collection, separation, and recovery of solid waste, and the environmentally safe disposal of nonrecoverable residues;

(2) providing training grants in occupations involving the design, operation, and maintenance of solid waste disposal systems;

(3) prohibiting future open dumping on the land and requiring the conversion of existing open dumps to facilities which do not pose a danger to the environment or to health;

(4) assuring that hazardous waste management practices are conducted in a manner which protects human health and the environment;

(5) requiring that hazardous waste be properly managed in the first instance thereby reducing the need for corrective action at a future date;

(6) minimizing the generation of hazardous waste and the land disposal of hazardous waste by encouraging process substitution, materials recovery, properly conducted recycling and reuse, and treatment;

(7) establishing a viable Federal-State partnership to carry out the purposes of this Act [42 USCS §§ 6901 et seq.] and insuring that the Administrator will, in carrying out the provisions of subtitle C of this Act [42 USCS §§ 6921 et seq.], give a high priority to assisting and cooperating with States in obtaining full authorization of State programs under subtitle C [42 USCS §§ 6921 et seq.];

(8) providing for the promulgation of guidelines for solid waste collection, transport, separation, recovery, and disposal practices and systems;

(9) promoting a national research and development program for improved solid waste management and resource conservation techniques, more effective organizational arrangements, and new and improved methods of collection, separation, and recovery, and recycling of solid wastes and environmentally safe disposal of nonrecoverable residues;

(10) promoting the demonstration, construction, and application of solid waste management, resource recovery, and resource conservation systems which preserve and enhance the quality of air, water, and land resources; and

(11) establishing a cooperative effort among the Federal, State, and local governments and private enterprise in order to recover valuable materials and energy from solid waste.

(b) National policy.

The Congress hereby declares it to be the national policy of the United States that, wherever feasible, the generation of hazardous waste is to be reduced or eliminated as expeditiously as possible. Waste that is nevertheless generated should be treated, stored, or disposed of so as to minimize the present and future threat to human health and the environment.

* * * *

Appendix F-1

TITLE 42. THE PUBLIC HEALTH AND WELFARE CHAPTER 82. SOLID WASTE DISPOSAL HAZARDOUS WASTE MANAGEMENT

42 USCS § 6926 (2002)

§ 6926. Authorized State hazardous waste programs

(a) Federal guidelines.

Not later than eighteen months after the date of enactment of this Act [Oct. 21, 1976], the Administrator, after consultation with State authorities, shall promulgate guidelines to assist States in the development of State hazardous waste programs.

(b) Authorization of State program.

Any State which seeks to administer and enforce a hazardous waste (and to enforce permits deemed to have been issued under section 3012(d)(1) [42 USCS § 6933(d)(1)]) program pursuant to this subtitle [42 USCS §§ 6921 et seq.] may develop and, after notice and opportunity for public hearing, submit to the Administrator an application, in such form as he shall require, for authorization of such program. Within ninety days following submission of an application under this subsection, the Administrator shall issue a notice as to whether or not he expects such program to be authorized, and within ninety days following such notice (and after opportunity for public hearing) he shall publish his findings as to whether or not the conditions listed in items (1), (2), and (3) below have been met. Such State is authorized to carry out such program in lieu of the Federal program under this subtitle [42 USCS §§ 6921 et seq.] in such State and to issue and enforce permits for the storage, treatment, or disposal of hazardous waste and to enforce permits deemed to have been issued under section 3012(d)(1) [42 USCS § 6933(d)(1)] unless, within ninety days

following submission of the application the Administrator notifies such State that such program may not be authorized and, within ninety days following such notice and after opportunity for public hearing, he finds that (1) such State program is not equivalent to the Federal program under this subtitle [42 USCS §§ 6921 et seq.], (2) such program is not consistent with the Federal or State programs applicable in other States, or (3) such program does not provide adequate enforcement of compliance with the requirements of this subtitle [42 USCS §§ 6921 et seq.]. In authorizing a State program, the Administrator may base his findings on the Federal program in effect one year prior to submission of a State's application or in effect on January 26, 1983, whichever is later.

(c) Interim authorization.

(1) Any State which has in existence a hazardous waste program pursuant to State law before the date ninety days after the date of promulgation of regulations under sections 3002, 3003, 3004, and 3005 [42 USCS §§ 6922, 6923, 6924, and 6925], may submit to the Administrator evidence of such existing program and may request a temporary authorization to carry out such program under this subtitle [42 USCS §§ 6921 et seq.]. The Administrator shall, if the evidence submitted shows the existing State program to be substantially equivalent to the Federal program under this subtitle, grant an interim authorization to the State to carry out such program in lieu of the Federal program pursuant to this subtitle [42 USCS §§ 6921 et seq.] for a period ending no later than January 31, 1986.

(2) The Administrator shall, by rule, establish a date for the expiration of interim authorization under this subsection.

(3) Pending interim or final authorization of a State program for any State which reflects the amendments made by the Hazardous and Solid Waste Amendments of 1984 [Nov. 8,

1984], the State may enter into an agreement with the Administrator under which the State may assist in the administration of the requirements and prohibitions which take effect pursuant to such Amendments.

(4) In the case of a State permit program for any State which is authorized under subsection (b) or under this subsection, until such program is amended to reflect the amendments made by the Hazardous and Solid Waste Amendments of 1984 and such program amendments receive interim or final authorization, the Administrator shall have the authority in such State to issue or deny permits or those portions of permits affected by the requirements and prohibitions established by the Hazardous and Solid Waste Amendments of 1984. The Administrator shall coordinate with States the procedures for issuing such permits.

(d) Effect of State permit.

Any action taken by a State under a hazardous waste program authorized under this section shall have the same force and effect as action taken by the Administrator under this subtitle [42 USCS §§ 6921 et seq.].

(e) Withdrawal of authorization.

Whenever the Administrator determines after public hearing that a State is not administering and enforcing a program authorized under this section in accordance with requirements of this section, he shall so notify the State and, if appropriate corrective action is not taken within a reasonable time, not to exceed ninety days, the Administrator shall withdraw authorization of such program and establish a Federal program pursuant to this subtitle [42 USCS §§ 6921 et seq.]. The Administrator shall not withdraw authorization of any such program unless he shall first have notified the State, and made public, in writing, the reasons for such withdrawal.

(f) Availability of information.

No State program may be authorized by the Administrator under this section unless—

(1) such program provides for the public availability of information obtained by the State regarding facilities and sites for the treatment, storage, and disposal of hazardous waste; and

(2) such information is available to the public in substantially the same manner, and to the same degree, as would be the case if the Administrator was carrying out the provisions of this subtitle [42 USCS §§ 6921 et seq.] in such State.

(g) Amendments made by 1984 Act.

(1) Any requirement or prohibition which is applicable to the generation, transportation, treatment, storage, or disposal of hazardous waste and which is imposed under this subtitle [42 USCS §§ 6921 et seq.] pursuant to the amendments made by the Hazardous and Solid Waste Amendments of 1984 shall take effect in each State having an interim or finally authorized State program on the same date as such requirement takes effect in other States. The Administrator shall carry out such requirement directly in each such State unless the State program is finally authorized (or is granted interim authorization as provided in paragraph (2)) with respect to such requirement.

(2) Any State which, before the date of the enactment of the Hazardous and Solid Waste Amendments of 1984 [Nov. 8, 1984] has an existing hazardous waste program which has been granted interim or final authorization under this section may submit to the Administrator evidence that such existing program contains (or has been amended to include) any requirement which is substantially equivalent to a requirement

referred to in paragraph (1) and may request interim authorization to carry out that requirement under this subtitle [42 USCS §§ 6921 et seq.]. The Administrator shall, if the evidence submitted shows the State requirement to be substantially equivalent to the requirement referred to in paragraph (1), grant an interim authorization to the State to carry out such requirement in lieu of direct administration in the State by the Administrator of such requirement.

(h) State programs for used oil.

In the case of used oil which is not listed or identified under this subtitle [42 USCS §§ 6921 et seq.] as a hazardous waste but which is regulated under section 3014 [42 USCS § 6935], the provisions of this section regarding State programs shall apply in the same manner and to the same extent as such provisions apply to hazardous waste identified or listed under this subtitle [42 USCS §§ 6921 et seq.].

* * * *

Appendix G-1

TITLE 42. THE PUBLIC HEALTH AND WELFARE CHAPTER 82. SOLID WASTE DISPOSAL HAZARDOUS WASTE MANAGEMENT

42 USCS § 6928 (2002)

§ 6928. Federal enforcement

(a) Compliance orders.

(1) Except as provided in paragraph (2), whenever on the basis of any information the Administrator determines that any person has violated or is in violation of any requirement of this subtitle [42 USCS §§ 6921 et seq.], the Administrator may issue an order assessing a civil penalty for any past or current violation, requiring compliance immediately or within a specified time period, or both, or the Administrator may commence a civil action in the United States district court in the district in which the violation occurred for appropriate relief, including a temporary or permanent injunction.

(2) In the case of a violation of any requirement of this subtitle [42 USCS §§ 6921 et seq.] where such violation occurs in a State which is authorized to carry out a hazardous waste program under section 3006 [42 USCS § 6926], the Administrator shall give notice to the State in which such violation has occurred prior to issuing an order or commencing a civil action under this section.

(3) Any order issued pursuant to this subsection may include a suspension or revocation of any permit issued by the Administrator or a State under this subtitle [42 USCS §§ 6921 et seq.] and shall state with reasonable specificity the nature of the violation. Any penalty assessed in the order shall not exceed $25,000 per day of noncompliance for each violation of a requirement of this subtitle [42 USCS §§ 6921 et seq.]. In

assessing such a penalty, the Administrator shall take into account the seriousness of the violation and any good faith efforts to comply with applicable requirements.

(b) Public hearing.

Any order issued under this section shall become final unless, no later than thirty days after the order is served, the person or persons named therein request a public hearing. Upon such request the Administrator shall promptly conduct a public hearing. In connection with any proceeding under this section the Administrator may issue subpenas for the attendance and testimony of witnesses and the production of relevant papers, books, and documents, and may promulgate rules for discovery procedures.

(c) Violation of compliance orders.

If a violator fails to take corrective action within the time specified in a compliance order, the Administrator may assess a civil penalty of not more than $25,000 for each day of continued noncompliance with the order and the Administrator may suspend or revoke any permit issued to the violator (whether issued by the Administrator or the State).

(d) Criminal penalties.

Any person who—

(1) knowingly transports or causes to be transported any hazardous waste identified or listed under this subtitle [42 USCS §§ 6921 et seq.] to a facility which does not have a permit under this subtitle [42 USCS §§ 6921 et seq.], or pursuant to title I of the Marine Protection, Research, and Sanctuaries Act (86 Stat. 1052) [33 USCS §§ 1411 et seq.],

(2) knowingly treats, stores, or disposes of any hazardous waste identified or listed under this subtitle [42 USCS §§ 6921 et seq.]—

(A) without a permit under this subtitle [42 USCS §§ 6921 et seq.] or pursuant to title I of the Marine Protection, Research, and Sanctuaries Act (86 Stat. 1052) [33 USCS §§1411 et seq.]; or

(B) in knowing violation of any material condition or requirement of such permit; or

(C) in knowing violation of any material condition or requirement of any applicable interim status regulations or standards;

(3) knowingly omits material information or makes any false material statement or representation in any application, label, manifest, record, report, permit, or other document filed, maintained, or used for purposes of compliance with regulations promulgated by the Administrator (or by a State in the case of an authorized State program) under this subtitle [42 USCS §§ 6921 et seq.];

(4) knowingly generates, stores, treats, transports, disposes of, exports, or otherwise handles any hazardous waste or any used oil not identified or listed as a hazardous waste under this subtitle [42 USCS §§ 6921 et seq.] (whether such activity took place before or takes place after the date of the enactment of this paragraph [Oct. 21, 1980]) and who knowingly destroys, alters, conceals, or fails to file any record, application, manifest, report, or other document required to be maintained or filed for purposes of compliance with regulations promulgated by the Administrator (or by a State in the case of an authorized State program) under this subtitle [42 USCS §§ 6921 et seq.];

(5) knowingly transports without a manifest, or causes to be transported without a manifest, any hazardous waste or any used oil not identified or listed as a hazardous waste under this subtitle [42 USCS §§ 6921 et seq.] required by regulations

promulgated under this subtitle [42 USCS §§ 6921 et seq.] (or by a State in the case of a State program authorized under this subtitle [42 USCS §§ 6921 et seq.]) to be accompanied by a manifest;

(6) knowingly exports a hazardous waste identified or listed under this subtitle [42 USCS §§ 6921 et seq.] (A) without the consent of the receiving country or, (B) where there exists an international agreement between the United States and the government of the receiving country establishing notice, export, and enforcement procedures for the transportation, treatment, storage, and disposal of hazardous wastes, in a manner which is not in conformance with such agreement[.]; or

(7) knowingly stores, treats, transports, or causes to be transported, disposes of, or otherwise handles any used oil not identified or listed as a hazardous waste under subtitle C of the Solid Waste Disposal Act [42 USCS §§ 6921 et seq.]—

(A) in knowing violation of any material condition or requirement of a permit under this subtitle C [42 USCS §§ 6921 et seq.]; or

(B) in knowing violation of any material condition or requirement of any applicable regulations or standards under this Act [42 USCS §§ 6901 et seq.]; shall, upon conviction, be subject to a fine of not more than $50,000 for each day of violation, or imprisonment not to exceed two years (five years in the case of a violation of paragraph (1) or (2)), or both. If the conviction is for a violation committed after a first conviction of such person under this paragraph, the maximum punishment under the respective paragraph shall be doubled with respect to both fine and imprisonment.

(e) Knowing endangerment.

Any person who knowingly transports, treats, stores, disposes of, or exports any hazardous waste identified or listed under this subtitle or used oil not identified or listed as a hazardous waste under this subtitle [42 USCS §§ 6921 et seq.] in violation of paragraph (1), (2), (3), (4), (5), (6), or (7) of subsection (d) of this section who knows at that time that he thereby places another person in imminent danger of death or serious bodily injury, shall, upon conviction, be subject to a fine of not more than $250,000 or imprisonment for not more than fifteen years, or both. A defendant that is an organization shall, upon conviction of violating this subsection, be subject to a fine of not more than $1,000,000.

(f) Special rules.

For the purposes of subsection (e)—

(1) A person's state of mind is knowing with respect to—

(A) his conduct, if he is aware of the nature of his conduct;

(B) an existing circumstance, if he is aware or believes that the circumstance exists; or

(C) a result of his conduct, if he is aware or believes that his conduct is substantially certain to cause danger of death or serious bodily injury.

(2) In determining whether a defendant who is a natural person knew that his conduct placed another person in imminent danger of death or serious bodily injury—

(A) the person is responsible only for actual awareness or actual belief that he possessed; and

(B) knowledge possessed by a person other than the defendant but not by the defendant himself may not be attributed to the defendant;

Provided, That in proving the defendant's possession of actual knowledge, circumstantial evidence may be used, including evidence that the defendant took affirmative steps to shield himself from relevant information.

(3) It is an affirmative defense to a prosecution that the conduct charged was consented to by the person endangered and that the danger and conduct charged were reasonably foreseeable hazards of—

(A) an occupation, a business, or a profession; or

(B) medical treatment or medical or scientific experimentation conducted by professionally approved methods and such other person had been made aware of the risks involved prior to giving consent.

The defendant may establish an affirmative defense under this subsection by a preponderance of the evidence.

(4) All general defenses, affirmative defenses, and bars to prosecution that may apply with respect to other Federal criminal offenses may apply under subsection (e) and shall be determined by the courts of the United States according to the principles of common law as they may be interpreted in the light of reason and experience. Concepts of justification and excuse applicable under this section may be developed in the light of reason and experience.

(5) The term "organization" means a legal entity, other than a government, established or organized for any purpose, and such term includes a corporation, company, association,

firm, partnership, joint stock company, foundation, institution, trust, society, union, or any other association of persons.

(6) The term "serious bodily injury" means—

(A) bodily injury which involves a substantial risk of death;

(B) unconsciousness;

(C) extreme physical pain;

(D) protracted and obvious disfigurement; or

(E) protracted loss or impairment of the function of a bodily member, organ, or mental faculty.

(g) Civil penalty.

Any person who violates any requirement of this subtitle [42 USCS §§ 6921 et seq.] shall be liable to the United States for a civil penalty in an amount not to exceed $25,000 for each such violation. Each day of such violation shall, for purposes of this subsection, constitute a separate violation.

(h) Interim status corrective action orders.

(1) Whenever on the basis of any information the Administrator determines that there is or has been a release of hazardous waste into the environment from a facility authorized to operate under section 3005(e) of this subtitle [42 USCS § 6925(e)], the Administrator may issue an order requiring corrective action or such other response measure as he deems necessary to protect human health or the environment or the Administrator may commence a civil action in the United States district court in the district in which the facility is located for

appropriate relief, including a temporary or permanent injunction.

(2) Any order issued under this subsection may include a suspension or revocation of authorization to operate under section 3005(e) of this subtitle [42 USCS § 6925(e)], shall state with reasonable specificity the nature of the required corrective action or other response measure, and shall specify a time for compliance. If any person named in an order fails to comply with the order, the Administrator may assess, and such person shall be liable to the United States for, a civil penalty in an amount not to exceed $25,000 for each day of noncompliance with the order.

* * * *

Appendix H-1

TITLE 42. THE PUBLIC HEALTH AND WELFARE CHAPTER 82. SOLID WASTE DISPOSAL MISCELLANEOUS PROVISIONS

42 USCS § 6972 (2002)

§ 6972. Citizen suits

(a) In general.

Except as provided in subsection (b) or (c) of this section, any person may commence a civil action on his own behalf—

(1) (A) against any person (including (a) the United States, and (b) any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of any permit, standard, regulation, condition, requirement, prohibition, or order which has become effective pursuant to this Act [42 USCS §§ 6901 et seq.]; or

(B) against any person, including the United States and any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution, and including any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility, who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment; or

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this Act [42 USCS §§ 6901 et seq.] which is not discretionary with the Administrator.

Any action under paragraph (a)(1) of this subsection shall be brought in the district court for the district in which the alleged violation occurred or the alleged endangerment may occur. Any action brought under paragraph (a)(2) of this subsection may be brought in the district court for the district in which the alleged violation occurred or in the District Court of the District of Columbia. The district court shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce the permit, standard, regulation, condition, requirement, prohibition, or order, referred to in paragraph (1)(A), to restrain any person who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste referred to in paragraph (1)(B), to order such person to take such other action as may be necessary, or both, or to order the Administrator to perform the act or duty referred to in paragraph (2), as the case may be, and to apply any appropriate civil penalties under section 3008(a) and (g) [42 USCS § 6928(a) and (g)].

(b) Actions prohibited.

(1) No action may be commenced under subsection (a)(1)(A) of this section—

(A) prior to 60 days after the plaintiff has given notice of the violation to—

(i) the Administrator;

(ii) the State in which the alleged violation occurs; and

(iii) to any alleged violator of such permit, standard, regulation, condition, requirement, prohibition, or order, except that such action may be brought immediately after such notification in the case of an action under this section respecting

a violation of subtitle C of this Act [42 USCS §§ 6921 et seq.]; or

(B) if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States or a State to require compliance with such permit, standard, regulation, condition, requirement, prohibition, or order.

In any action under subsection (a)(1)(A) in a court of the United States, any person may intervene as a matter of right.

(2) (A) No action may be commenced under subsection (a)(1)(B) of this section prior to ninety days after the plaintiff has given notice of the endangerment to—

(i) the Administrator;

(ii) the State in which the alleged endangerment may occur;

(iii) any person alleged to have contributed or to be contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste referred to in subsection (a)(1)(B), except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of subtitle C of this Act [42 USCS §§ 6921 et seq.].

(B) No action may be commenced under subsection (a)(1)(B) of this section if the Administrator, in order to restrain or abate acts or conditions which may have contributed or are contributing to the activities which may present the alleged endangerment—

(i) has commenced and is diligently prosecuting an action under section 7003 of this Act [42 USCS § 6973] or under section 106 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 [42 USCS § 9606],[;]

(ii) is actually engaging in a removal action under section 104 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 [42 USCS § 9604];

(iii) has incurred costs to initiate a Remedial Investigation and Feasibility Study under section 104 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 [42 USCS § 9604] and is diligently proceeding with a remedial action under that Act [42 USCS §§ 9601 et seq.]; or

(iv) has obtained a court order (including a consent decree) or issued an administrative order under section 106 of the Comprehensive Environmental Response, Compensation and Liability Act of 980 [1980] [42 USCS § 9606], or section 7003 of this Act [42 USCS § 6973] pursuant to which a responsible party is diligently conducting a removal action, Remedial Investigation and Feasibility Study (RIFS), or proceeding with a remedial action.

In the case of an administrative order referred to in clause (iv), actions under subsection (a)(1)(B) are prohibited only as to the scope and duration of the administrative order referred to in clause (iv).

(C) No action may be commenced under subsection (a)(1)(B) of this section if the State, in order to restrain or abate acts or conditions which may have contributed or are contributing to the activities which may present the alleged endangerment—

(i) has commenced and is diligently prosecuting an action under subsection (a)(1)(B);

(ii) is actually engaging in a removal action under section 104 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 [42 USCS § 9604]; or

(iii) has incurred costs to initiate a Remedial Investigation and Feasibility Study under section 104 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 [42 USCS § 9604] and is diligently proceeding with a remedial action under that Act [42 USCS §§ 9601 et seq.].

(D) No action may be commenced under subsection (a)(1)(B) by any person (other than a State or local government) with respect to the siting of a hazardous waste treatment, storage, or a disposal facility, nor to restrain or enjoin the issuance of a permit for such facility.

(E) In any action under subsection (a)(1)(B) in a court of the United States, any person may intervene as a matter of right when the applicant claims an interest relating to the subject of the action and he is so situated that the disposition of the action may, as a practical matter, impair or impede his ability to protect that interest, unless the Administrator or the State shows that the applicant's interest is adequately represented by existing parties.

(F) Whenever any action is brought under subsection (a)(1)(B) in a court of the United States, the plaintiff shall serve a copy of the complaint on the Attorney General of the United States and with the Administrator.

(c) Notice.

No action may be commenced under paragraph (a)(2) of this section prior to sixty days after the plaintiff has given notice to the Administrator that he will commence such action, except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of subtitle C of this Act [42 USCS §§ 6921 et seq.]. Notice under this subsection shall be given in such manner as the Administrator shall prescribe by regulation. Any action respecting a violation under this Act [42 USCS §§ 6901 et seq.] may be brought under this section only in the judicial district in which such alleged violation occurs.

(d) Intervention.

In any action under this section the Administrator, if not a party, may intervene as a matter of right.

(e) Costs.

The court, in issuing any final order in any action brought pursuant to this section or section 7006 [42 USCS § 6976], may award costs of litigation (including reasonable attorney and expert witness fees) to the prevailing or substantially prevailing party, whenever the court determines such an award is appropriate. The court may, if a temporary restraining order or preliminary injunction is sought, require the filing of a bond or equivalent security in accordance with the Federal Rules of Civil Procedure.

(f) Other rights preserved.

Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any standard or requirement relating to the management of solid waste or hazardous waste, or to seek any other relief (including relief against the Administrator or a State agency).

(g) Transporters.

A transporter shall not be deemed to have contributed or to be contributing to the handling, storage, treatment, or disposal, referred to in subsection (a)(1)(B) taking place after such solid waste or hazardous waste has left the possession or control of such transporter, if the transportation of such waste was under a sole contractual arrangement arising from a published tariff and acceptance for carriage by common carrier by rail and such transporter has exercised due care in the past or present handling, storage, treatment, transportation and disposal of such waste.

* * * *

Appendix I-1

191 F.3d 894, 1999 U.S. App. LEXIS 22405,
49 ERC (BNA) 1129; 29 ELR 21412

HARMON INDUSTRIES, INC., APPELLEE, v. CAROL M. BROWNER IN HER OFFICIAL CAPACITY AS ADMINISTRATOR OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; UNITED STATES OF AMERICA; UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Appellants. PACIFIC LEGAL FOUNDATION; MICHIGAN MANUFACTURERS ASSOCIATION; MISSISSIPPI MANUFACTURERS ASSOCIATION; ILLINOIS MANUFACTURERS ASSOCIATION; SOUTH CAROLINA CHAMBERS OF COMMERCE; ENVIRONMENTAL FEDERATION OF OKLAHOMA; ARKANSAS STATE CHAMBER OF COMMERCE; ASSOCIATED INDUSTRIES OF ARKANSAS, INC.; WISCONSIN MANUFACTURERS AND COMMERCE; THE TEXAS NATURAL RESOURCE CONSERVATION COMMISSION; AMERICAN FOREST & PAPER ASSOCIATION; AMERICAN IRON & STEEL INSTITUTE; AMERICAN PETROLEUM INSTITUTE; CHAMBER OF COMMERCE OF THE UNITED STATES; CHEMICAL MANUFACTURERS ASSOCIATION; CORPORATE ENVIRONMENTAL ENFORCEMENT COUNCIL; COMMERCIAL AFFAIRS COMMITTEE OF THE HAZARDOUS WASTE ACTION COALITION; NATIONAL ASSOCIATION OF MANUFACTURERS; NATIONAL MINING ASSOCIATION; NATIONAL PETROCHEMICAL & REFINERS ASSOCIATION; RUBBER MANUFACTURERS ASSOCIATION; UTILITY SOLID WASTE ACTIVITIES GROUP, WASHINGTON LEGAL FOUNDATION; MISSOURI CHAMBER OF COMMERCE; ASSOCIATED INDUSTRIES OF MISSOURI, Amici on Behalf of Appellee.

Appendix I-2

No. 98-3775

UNITED STATES COURT OF APPEALS FOR
THE EIGHTH CIRCUIT

191 F.3d 894; 1999 U.S. App. LEXIS 22405;
49 ERC (BNA) 1129; 29 ELR 21412

April 22, 1999, Submitted
September 16, 1999, Filed

SUBSEQUENT HISTORY: The Name of the Case has been Corrected by the Court September 21, 1999.

Rehearing En Banc and Rehearing Denied January 24, 2000, Reported at: 2000 U.S. App. LEXIS 33249.

PRIOR HISTORY: Appeal from the United States District Court for the Western District of Missouri. 97-0832-CV-W-3. Honorable Ortie Smith, District Judge.

DISPOSITION: Affirmed.

* * * *

COUNSEL: Counsel who presented argument on behalf of the appellant was Robert H. Oakley of Washington, D.C., Lois J. Schiffer, Eric G. Hostetler, David Shilton and Belinda L. Holmes also appeared on appellants' brief.

Counsel who presented argument on behalf of the appellee was Alok Ahuja of Kansas City, MO. Terry J. Satterlee also appeared on appellee's brief.

JUDGES: Before BEAM and HANSEN, Circuit Judges, and MOODY, n1 District Judge.

----------Footnotes----------

n1 The Honorable James M. Moody, United States District Judge for the Eastern District of Arkansas, sitting by designation.

----------End Footnotes----------

OPINION BY: HANSEN

OPINION:

HANSEN, Circuit Judge.

Harmon Industries, Inc. (Harmon) filed this action pursuant to the Administrative Procedure Act, 5 U.S.C. § 706 (1994), seeking judicial review of a final decision of the United States Environmental Protection Agency (EPA). The district court n2 granted summary judgment in favor of Harmon and reversed the decision of the EPA. The EPA appeals. We affirm.

----------Footnotes----------

n2 The Honorable Ortrie D. Smith, United States District Judge for the Western District of Missouri.

----------End Footnotes----------

I. FACTS AND PROCEDURAL BACKGROUND

Harmon Industries operates a plant in Grain Valley, Missouri, which it utilizes to assemble circuit boards for railroad control and safety equipment. In November 1987, Harmon's personnel manager discovered that maintenance workers at Harmon routinely discarded volatile solvent residue behind Harmon's Grain Valley plant. This practice apparently

began in 1973 and continued until November 1987. Harmon's management was unaware of its employees' practices until the personnel manager filed his report in November 1987. Following the report, Harmon ceased its disposal activities and voluntarily contacted the Missouri Department of Natural Resources (MDNR). The MDNR investigated and concluded that Harmon's past disposal practices did not pose a threat to either human health or the environment. The MDNR and Harmon created a plan whereby Harmon would clean up the disposal area. Harmon implemented the clean up plan. While Harmon was cooperating with the MDNR, the EPA initiated an administrative enforcement action against Harmon in which the federal agency sought $2,343,706 in penalties. Meanwhile, Harmon and the MDNR continued to establish a voluntary compliance plan. In harmonizing the details of the plan, Harmon asked the MDNR not to impose civil penalties. Harmon based its request in part on the fact that it voluntarily self-reported the environmental violations and cooperated fully with the MDNR.

On March 5, 1993, while the EPA's administrative enforcement action was pending, a Missouri state court judge approved a consent decree entered into by the MDNR and Harmon. In the decree, MDNR acknowledged full accord and satisfaction and released Harmon from any claim for monetary penalties. MDNR based its decision to release Harmon on the fact that the company promptly self-reported its violation and cooperated in all aspects of the investigation. After the filing of the consent decree, Harmon litigated the EPA claim before an administrative law judge (ALJ). The ALJ found that a civil penalty against Harmon was appropriate in this case. The ALJ rejected the EPA's request for a penalty in excess of $2 million but the ALJ did impose a civil fine of $586,716 against Harmon. A three-person Environmental Appeals Board panel affirmed the ALJ's monetary penalty. Harmon filed a complaint challenging the EPA's decision in federal district

court on June 6, 1997. In its August 25, 1998, summary judgment order, the district court found that the EPA's decision to impose civil penalties violated the Resource Conservation and Recovery Act and contravened principles of res judicata. *See Harmon Indus., Inc. v. Browner*, 19 F. Supp. 2d 988 (W. D. Mo. 1998). The EPA appeals to this court. n3

----------Footnotes----------

n3 Approximately thirty different organizations filed six amicus curiae briefs in support of Harmon Industries.

----------End Footnotes----------

II. DISCUSSION

A. The Permissibility of Overfiling

When reviewing a federal agency's interpretation of a federal statute, a federal court must defer to the agency's interpretation only if it finds that the agency's interpretation is consistent with the plain language of the statute or represents a reasonable interpretation of an ambiguous statute. *See Chevron U.S. A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-45, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984). We review de novo a district court's findings and conclusions regarding the correctness of an agency's statutory interpretations. *See Moore v. Custis*, 736 F.2d 1260, 1262 (8th Cir. 1984).

The Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6901-6992K (1994), permits states to apply to the EPA for authorization to administer and enforce a hazardous waste program. *See* 42 U.S.C. § 6926(b). If authorization is granted, the state's program then operates "in lieu of" the federal government's hazardous waste program. *Id.* The EPA

authorization also allows states to issue and enforce permits for the treatment, storage, and disposal of hazardous wastes. *Id.* "Any action taken by a State under a hazardous waste program authorized under [the RCRA] [has] the same force and effect as action taken by the [EPA] under this subchapter." 42 U.S.C. § 6926(d). Once authorization is granted by the EPA, it cannot be rescinded unless the EPA finds that (1) the state program is not equivalent to the federal program, (2) the state program is not consistent with federal or state programs in other states, or (3) the state program is failing to provide adequate enforcement of compliance in accordance with the requirements of federal law. *See* 42 U.S.C. § 6926(b). Before withdrawing a state's authorization to administer a hazardous waste program, the EPA must hold a public hearing and allow the state a reasonable period of time to correct the perceived deficiency. *See* 42 U.S.C. § 6926(e).

Missouri, like many other states, is authorized to administer and enforce a hazardous waste program pursuant to the RCRA. Despite having authorized a state to act, the EPA frequently files its own enforcement actions against suspected environmental violators even after the commencement of a state-initiated enforcement action. *See* Bryan S. Miller, Harmonizing RCRA's Enforcement Provisions: RCRA Overfiling in Light of *Harmon Industries v. Browner*, 5 Environmental Law. 585 (1999). The EPA's process of duplicating enforcement actions is known as overfiling. *See id.* The permissibility of overfiling apparently is a question of first impression in the federal circuit courts. *See Harmon*, 19 F. Supp. 2d at 995. After examining this apparent issue of first impression, the district court concluded that the plain language of section 6926(b) dictates that the state program operate "in lieu" of the federal program and with the "same force and effect" as EPA action. Accordingly, the district court found that, in this case, the RCRA precludes the EPA from assessing its own penalty against Harmon. *See id.*

The EPA contends that the district court's interpretation runs contrary to the plain language of the RCRA. Specifically, the EPA cites section 6928 of the RCRA, which states that:

> (1) Except as provided in paragraph (2), whenever on the basis of any information the [EPA] determines that any person has violated or is in violation of any requirement of this subchapter, the [EPA] may issue an order assessing a civil penalty for any past or current violation, requiring compliance immediately or within a specified time period, or both, or the [EPA] may commence a civil action in the United States district court in the district in which the violation occurred for appropriate relief, including a temporary or permanent injunction.
>
> (2) In the case of a violation of any requirement of [the RCRA] where such violation occurs in a State which is authorized to carry out a hazardous waste program under section 6926 of this title, the [EPA] shall give notice to the State in which such violation has occurred prior to issuing an order or commencing a civil action under this section. 42 U.S.C. § 6928(a)(1) and (2).

The EPA argues that the plain language of section 6928 allows the federal agency to initiate an enforcement action against an environmental violator even in states that have received authorization pursuant to the RCRA. The EPA contends that Harmon and the district court misinterpreted the phrases "in lieu of" and "same force and effect" as contained in the RCRA. According to the EPA, the phrase "in lieu of" refers to which regulations are to be enforced in an authorized state rather than who is responsible for enforcing the regulations. The EPA argues that the phrase "same force and effect" refers only to the effect of state issued permits. The EPA contends

that the RCRA, taken as a whole, authorizes either the state or the EPA to enforce the state's regulations, which are in compliance with the regulations of the EPA. The only requirement, according to the EPA, is that the EPA notify the state in writing if it intends to initiate an enforcement action against an alleged violator.

Both parties argue that the plain language of the RCRA supports their interpretation of the statute. We also are ever mindful of the long-established plain language rule of statutory interpretation, *see Walker v. Dilworth*, 2 U.S. (2 Dall.) 257, 259, 1 L. Ed. 372 (1796), as we inquire into the scope of the EPA's enforcement powers under the RCRA. Such an inquiry requires examining the text of the statute as a whole by considering its context, "object, and policy." *Pelofsky v. Wallace*, 102 F.3d 350, 353 (8th Cir. 1996).

An examination of the statute as a whole supports the district court's interpretation. The RCRA specifically allows states that have received authorization from the federal government to administer and enforce a program that operates "in lieu of" the EPA's regulatory program. 42 U.S.C. § 6926(b). While the EPA is correct that the "in lieu of" language refers to the program itself, the administration and enforcement of the program are inexorably intertwined.

The RCRA gives authority to the states to create and implement their own hazardous waste program. The plain "in lieu of" language contained in the RCRA reveals a congressional intent for an authorized state program to supplant the federal hazardous waste program in all respects including enforcement. Congressional intent is evinced within the authorization language of section 6926(b) of the RCRA. Specifically, the statute permits the EPA to repeal a state's authorization if the state's program "does not provide adequate enforcement of compliance with the requirements of" the

RCRA. *Id.* This language indicates that Congress intended to grant states the primary role of enforcing their own hazardous waste program. Such an indication is not undermined, as the EPA suggests, by the language of section 6928. Again, section 6928(a)(1) allows the EPA to initiate enforcement actions against suspected environmental violators, except as provided in section 6928(a)(2). Section 6928(a)(2) permits the EPA to enforce the hazardous waste laws contained in the RCRA if the agency gives written notice to the state. Section 6928(a)(1) and (2), however, must be interpreted within the context of the entire Act. Harmonizing the section 6928(a)(1) and (2) language that allows the EPA to bring an enforcement action in certain circumstances with section 6926(b)'s provision that the EPA has the right to withdraw state authorization if the state's enforcement is inadequate manifests a congressional intent to give the EPA a secondary enforcement right in those cases where a state has been authorized to act that is triggered only after state authorization is rescinded or if the state fails to initiate an enforcement action. Rather than serving as an affirmative grant of federal enforcement power as the EPA suggests, we conclude that the notice requirement of section 6928(a)(2) reinforces the primacy of a state's enforcement rights under RCRA. Taken in the context of the statute as a whole, the notice requirement operates as a means to allow a state the first chance opportunity to initiate the statutorily-permitted enforcement action. If the state fails to initiate any action, then the EPA may institute its own action. Thus, the notice requirement is an indicator of the fact that Congress intended to give states, that are authorized to act, the lead role in enforcement under RCRA.

The "same force and effect" language of section 6926(d) provides additional support for the primacy of states' enforcement rights under the RCRA when the EPA has authorized a state to act in lieu of it. The EPA argues that the "same force and effect" language is limited to state permits

because the words appear under a heading that reads: "Effect of State Permit." The EPA contends that the "same force and effect" language indicates only that state-issued permits will have the same force and effect as permits issued by the federal government. The EPA claims that the district court was incorrect when it applied the "same force and effect" language to encompass the statute's enforcement mechanism. We disagree.

Regardless of the title or heading, the plain language of section 6926(d) states that "any action taken by a State under a hazardous waste program authorized under this section shall have the same force and effect as action taken by the [EPA] under this subchapter." 42 U.S.C. § 6926(d). In this context, the meaning of the text is plain and obvious. "Any action" under this provision broadly applies to any action authorized by the subchapter, and this language is not limited to the issuance of permits. The state authorization provision substitutes state action (not excluding enforcement action) for federal action. It would be incongruous to conclude that the RCRA authorizes states to implement and administer a hazardous waste program "in lieu of" the federal program where only the issuance of permits is accorded the same force and effect as an action taken by the federal government. Contrary to the EPA's assertions, the statute specifically provides that a "[s]tate is authorized to carry out [its hazardous waste program] in lieu of the Federal program . . . and to issue and enforce permits." 42 U.S.C. § 6926(b). Issuance and enforcement are two of the functions authorized as part of the state's hazardous waste enforcement program under the RCRA. Nothing in the statute suggests that the "same force and effect" language is limited to the issuance of permits but not their enforcement. We believe that if Congress had intended such a peculiar result, it would have stated its preference in a clear and unambiguous manner. Absent such an unambiguous directive, we will apply a common sense meaning to the text of the statute and interpret

its provisions in a manner logically consistent with the Act as whole. *See Windsor on the River Assoc., Ltd. v. Balcor Real Estate Fin., Inc.*, 7 F.3d 127, 130 (8th Cir. 1993) (requiring courts to give effect to all the words used by Congress); *see also Minnesota Transp. Reg. Bd. v. United States*, 966 F.2d 335, 339 (8th Cir. 1992) ("Section and subchapter titles cannot alter the plain meaning of a statute; they can only assist in clarifying ambiguity.").

Utilizing a sort of reverse plain language argument, the EPA contends that its approach is logically consistent with the framework of the RCRA. The EPA cites the statute's citizen suit provision for the proposition that limitations on a parties' right to act are expressly stated within the statute itself. *See* 42 U.S.C. § 6972(b)(1)(B). Section 6972 (b)(1)(B) provides that "if the [EPA] or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States or a State," then a private citizen suit is not permitted. *Id.* The EPA argues that if Congress had intended to limit the EPA's right to file an enforcement action, it would have expressly stated its intention as it did in the citizen suit context. We find the EPA's argument unpersuasive. Section 6972(b)(1)(B) of the RCRA provides the parameters for private litigation. In the course of providing such parameters, Congress apparently found it necessary to delineate exactly when and how a private citizen may initiate a civil action against an alleged environmental violator. In contrast, section 6926 of the RCRA addresses the interplay between federal and state authorization. Section 6926 also contains express language that establishes the primacy of states' enforcement rights once the EPA has granted a state authorization. The mere fact that Congress did not choose to employ the exact same language as contained in an unrelated part of the act does not detract from the plain language used in the state authorization section. Again, Congress provided that the state's program should operate in lieu of the federal program and that the state action

should operate with the same force and effect as action taken by the EPA. *See* 42 U.S.C. § 6926(b) and (d). We find the language contained in the state authorization section of the Act to be as unambiguous as the citizen suit provision. In fact, we find it revealing that, under the citizen suit provision, Congress chose to forbid a private citizen from acting if the EPA or a state was diligently pursing a civil action. *See* 42 U.S.C. § 6972(b)(1)(B). Utilizing the same reverse plain language argument, one can assume that if Congress intended to allow the federal government and the states to initiate competing enforcement actions, it would have chosen the words "and/ or" rather than simply "or." The word "or" indicates that Congress did not contemplate competing enforcement actions between the federal government and the states. Thus, when the EPA has authorized a state program, the plain language of the text indicates that primary enforcement powers are vested in the states. *See* 42 U.S.C. § 6926.

Even assuming some ambiguity exists in the statutory language, the primacy of the states' enforcement rights, once the EPA has authorized a state to act, is illustrated further through the RCRA's legislative history. The United States House of Representatives stated after its hearings that, through the RCRA, it intended to vest primary enforcement authority in the states. *See* H. R. Rep. 1491, 94th Cong., 2nd Sess. 24, reprinted in 1976 U.S.C.C.A.N. 6262 ("It is the Committee's intention that the States are to have primary enforcement authority and if at any time a State wishes to take over the hazardous waste program it is permitted to do so, provided that the State laws meet the Federal minimum requirements for both administering and enforcing the law."). The House Report states that although the "legislation permits the states to take the lead in the enforcement of the hazardous wastes [sic] laws [,] . . . the Administrator [of the EPA] is not prohibited from acting in those cases where the state fails to act, or from withdrawing approval of the state hazardous waste plan and implementing

the federal hazardous waste program pursuant to . . . this act." 1976 U.S.C.C.A.N. 6269. The House Report also states that the EPA, "after giving the appropriate notice to a state that is authorized to implement the state hazardous waste program, that violations of this Act are occurring and the state [is] failing to take action against such violations, is authorized to take appropriate action against those persons in such state not in compliance with the hazardous waste title." *Id.* at 6270. The House Report thus supports our interpretation of the statute — that the federal government's right to pursue an enforcement action under the RCRA attaches only when a state's authorization is revoked or when a state fails to initiate any enforcement action.

There is no support either in the text of the statute or the legislative history for the proposition that the EPA is allowed to duplicate a state's enforcement authority with its own enforcement action. The EPA argues that the statute and legislative history support its contention that it may initiate an enforcement action if it deems the state's enforcement action inadequate. The EPA's argument misses the point. Without question, the EPA can initiate an enforcement action if it deems the state's enforcement action inadequate. Before initiating such an action, however, the EPA must allow the state an opportunity to correct its deficiency and the EPA must withdraw its authorization. *See* 42 U.S.C. § 6926(b) and (e). Consistent with the text of the statute and its legislative history, the EPA also may initiate an enforcement action after providing written notice to the state when the authorized state fails to initiate any enforcement action. *See* 42 U.S.C. § 6928(a)(2); 1976 U.S.C.C.A.N. 6270. The EPA may not, however, simply fill the perceived gaps it sees in a state's enforcement action by initiating a second enforcement action without allowing the state an opportunity to correct the deficiency and then withdrawing the state's authorization. n4

----------Footnotes----------

n4 The EPA cites *Wyckoff Co. v. EPA*, 796 F.2d 1197 (9th Cir. 1986), for the proposition that federal enforcement is not prohibited even in states authorized under the RCRA. *Wyckoff*, however, is more illustrative of the EPA's authority to act in place of a state enforcement action. *Wyckoff* did not involve overfiling and competing enforcement actions.

----------End Footnotes----------

A contrary interpretation would result in two separate enforcement actions. Such an interpretation, as explained above, would derogate the RCRA's plain language and legislative history. Companies that reach an agreement through negotiations with a state authorized by the EPA to act in its place may find the agreement undermined by a later separate enforcement action by the EPA. While, generally speaking, two separate sovereigns can institute two separate enforcement actions, those actions can cause vastly different and potentially contradictory results. Such a potential schism runs afoul of the principles of comity and federalism so clearly embedded in the text and history of the RCRA. When enacting the RCRA, Congress intended to delegate the primary enforcement of EPA-approved hazardous waste programs to the states. *See* 1976 U.S.C.C.A.N. 6262, 6270. In fact, as we have noted above, the states' enforcement action has the "same force and effect as an action taken by" the EPA. *See* 42 U.S.C. § 6926(d). In EPA authorized states, the EPA's action is an alternative method of enforcement that is permitted to operate only when certain conditions are satisfied. *See* 42 U.S.C. § 6926(b) and (e); 42 U.S.C. § 6928(b). The EPA's interpretation simply is not consistent with the plain language of the statute, its legislative history, or its declared purpose. Hence, it is also an unreasonable interpretation to which we accord no deference. Therefore, we find that the EPA's practice of overfiling, in

those states where it has authorized the state to act, oversteps the federal agency's authority under the RCRA.

B. Res Judicata.

As an alternative basis to support its grant of summary judgment, the district court concluded that principles of res judicata also bar the EPA's enforcement action by reason of the Missouri state court consent decree. The EPA argues that the state court judgment has no effect on its enforcement action against Harmon because the two actions lack the elements essential for a finding of res judicata. We review de novo a district court's summary judgment determinations. *See JN Exploration & Prod. v. Western Gas Resources*, 153 F.3d 906, 909 (8th Cir. 1998).

Principles of res judicata embodied in the Full Faith and Credit Act, 28 U.S.C. § 1738 (1982), *see also* U.S. Const. art. 4, § 1, require federal courts to give preclusive effect to the judgments of state courts whenever the state court from which the judgment emerged would give such an effect. *See Hickman v. Electronic Keyboarding, Inc.*, 741 F.2d 230, 232 (8th Cir. 1984). In this case, we must determine whether Missouri law would give res judicata effect to the consent decree entered between Harmon and the MDNR in Missouri state court.

In Missouri, res judicata requires "(1) identity of the thing sued for; (2) identity of the cause of action; (3) identity of the persons and parties to the action; and (4) identity of the quality of the person for or against whom the claim is made." *Prentzler v. Schneider*, 411 S.W.2d 135, 138 (Mo. 1966) (en banc).

In this case, the four Missouri law res judicata requirements are satisfied. In both the state court action and the EPA administrative enforcement action, the parties sought to

enforce a hazardous waste program pursuant to the RCRA. In both the state action and the agency action, the complaints named Harmon as the defendant. In addition, both actions involved the enforcement of regulations based upon identical facts and legal principles. The only dispute is whether the parties are identical.

A party is identical when it is the same party that litigated a prior suit or when a new party is in privity with a party that litigated a prior suit. *See United States v. Gurley*, 43 F.3d 1188, 1197 (8th Cir. 1994), cert. denied, 516 U.S. 817, 133 L. Ed. 2d 33, 116 S. Ct. 73 (1995). Privity exists when two parties to two separate suits have "a close relationship bordering on near identity." *Id.* (internal quotations omitted); *see also Hickman*, 741 F.2d at 233. As the United States and the State of Missouri are not the same party, we must resolve whether their relationship in the enforcement action is nearly identical.

The statutory language of the RCRA provides the framework for the party identity analysis. Pursuant to 42 U.S.C. § 6926(b), the federal program operates "in lieu of" the state program. Section 6926(d) of the same statute mandates that "any action taken by a State under a hazardous waste program authorized under this section shall have the same force and effect as action taken by the [EPA] under this subchapter." 42 U.S.C. § 6926(d). As we determined in Part II(A) of this opinion, the plain language of the RCRA permits the State of Missouri to act in lieu of the EPA. When such a situation occurs, Missouri's action has the same force and effect as an action initiated by the EPA. Accordingly, the two parties stand in the same relationship to one another. The EPA argues that it has enforcement interests sufficiently distinct from the interests of the State of Missouri. We explained in *Hickman*, however, that privity under Missouri law is satisfied when the two parties represent the same legal right. *See Hickman*, 741 F.2d at 233. As the district court correctly indicated, privity is

not dependent upon the subjective interests of the individual parties. *See Harmon*, 19 F. Supp. 2d at 998; *see also Hickman*, 741 F.2d at 233. In this case, the State of Missouri advanced the exact same legal right under the statute as the EPA did in its administrative action. Accordingly, the identity of the parties requirement is satisfied.

The EPA contends that even if principles of res judicata are satisfied under Missouri law, the doctrine of sovereign immunity precludes applying res judicata to the United States unless the United States was the actual party in the prior lawsuit. Before addressing the merits of the EPA's claim, we note that the EPA did not raise the sovereign immunity defense before the district court. Harmon argues that in failing to raise the issue at the district court level, the EPA has waived its right to assert sovereign immunity on appeal. Sovereign immunity, however, is a jurisdictional threshold matter and it is well-established that questions of subject matter jurisdiction can be raised for the first time on appeal. *See DeWitt Bank & Trust Co. v. United States*, 878 F.2d 246 (8th Cir. 1989), cert. denied, 494 U.S. 1016, 108 L. Ed. 2d 493, 110 S. Ct. 1318 (1990).

Turning to the merits of the EPA's sovereign immunity defense, we conclude that the defense is forestalled by the United States Supreme Court's decision in *Montana v. United States*, 440 U.S. 147, 59 L. Ed. 2d 210, 99 S. Ct. 970 (1979). In *Montana*, the Supreme Court held that "one who prosecutes or defends a suit in the name of another to establish and protect his own right is as much bound as he would be if he had been a party to the record." 440 U.S. at 154 (internal quotations and alterations omitted). The Court found in Montana that although the United States was not a party to a prior suit, it "had a sufficient laboring oar in the conduct of the state-court litigation to actuate principles of estoppel." *Id.* at 155 n5. The EPA argues that it had no laboring oar in the State of Missouri's enforcement action. Such an argument ignores the RCRA.

Unlike the present case, Montana did not involve a statute that authorized the state to proceed "in lieu of" the federal government and "with the same force and effect" as the federal government. In Montana, the United States controlled the details of the prior suit directly. In RCRA cases, however, the federal government authorizes the state to act in its place. It cedes its authority to the state pursuant to the authorization plan contained in the statute. *See* 42 U.S.C. § 6926(b). The "laboring oar" is pulled on much earlier in the process. It occurs at the authorization stage when the EPA grants the state permission to enforce the EPA's interests through the state's own hazardous waste program. After authorization, the state "prosecutes" enforcement actions "in lieu of" the federal government and operates as if it were the EPA. *See* 42 U.S.C. § 6926(b) and (d). Hence, pursuant to *Montana*, the United States must be bound by prior judgments involving state action as authorized by the RCRA. *See also United States v. County of Cook, Illinois*, 167 F.3d 381, 389 (7th Cir. 1999) (questioning when sovereign immunity to claim preclusion exists); *United States v. ITT Rayonier, Inc.*, 627 F.2d 996, 1002 (9th Cir. 1980) (applying res judicata against the EPA). Accordingly, we find that principles of res judicata as defined by Missouri law foreclose the EPA's enforcement action against Harmon.

----------Footnotes----------

n5 *Montana* involved principles of collateral estoppel as opposed to res judicata. 440 U.S. at 154. We do not believe such a distinction is relevant in the context of this case.

----------End Footnotes----------

C. The Statute of Limitations Defense

Harmon argues that the EPA's enforcement claim is barred by a five-year statute of limitations. *See* 28 U.S.C. § 2462. The district court found that the statute of limitations did not affect this action. Although our decision in this case precludes our need to address this issue and Harmon did not file a cross-appeal, we note that Harmon's statute of limitations claim entirely lacks merit. Harmon continuously polluted from 1973 to 1987. The EPA initiated its enforcement action in 1991. Hence, the EPA's action fell within the five-year statute of limitations. *See Cornerstone Realty, Inc. v. Dresser Rand Co.*, 993 F. Supp. 107, 114-15 (D. Conn. 1998). Accordingly, Harmon's statute of limitations argument fails.

III. CONCLUSION

For the reasons stated herein, we affirm the judgment of the district court.

Supreme Court, U.S.
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No. 02-1086

In the Supreme Court of the United States

POWER ENGINEERING COMPANY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

The question presented, in a case in which petitioners and the United States have settled the litigation with no reservation of rights to appeal, is:

Whether the United States may bring an enforcement action against petitioners under the Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. 6901 *et seq.*, after the State of Colorado had resolved a separate enforcement action under a federally authorized program that sought compliance with different waste regulation requirements.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals is reported at 303 F.3d 1232 (Pet. App. B1-B16). The decision of the district court is reported at 125 F. Supp. 2d 1050 (Pet. App. C1-C44).

JURISDICTION

The judgment of the court of appeals was entered on September 4, 2002. On November 14, 2002, Justice Breyer extended the time within which to file a petition for a writ of certiorari to and including January 17, 2003, and the petition was filed on that date (Pet. App. A1). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). Following the court of appeals' issuance of its mandate, the district court granted the parties' joint motion to terminate the litigation. See App.,

infra, 1a-6a. The United States submits that the question presented in the petition for a writ of certiorari accordingly is moot. See pp. 9-11, *infra*.

STATEMENT

The United States brought an action against petitioners under the Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. 6901 *et seq.*, to compel petitioners to comply with RCRA's financial assurance requirements for hazardous waste facilities. Petitioners contended that the United States was precluded from bringing that action because the State of Colorado had previously brought an enforcement action against petitioners, seeking compliance with different hazardous waste requirements. The district court rejected petitioners' argument and ultimately ruled that petitioners were obligated to provide financial assurances in the amount of $2,119,044. See Pet. App. C11-C33; *id.* at B5. The court of appeals affirmed. *Id.* at B1-B16. Upon joint motion of the parties, the district court reduced the amount of the financial assurances to $1,324,102 and terminated the litigation, subject to the district court's continuing jurisdiction over petitioners' financial assurance obligations. App., *infra*, 1a-6a.

1. Congress enacted RCRA to address serious environmental and health dangers arising from the generation, management, and disposal of solid waste. Subtitle C of RCRA, 42 U.S.C. 6921-6939e, establishes a "'cradle to grave' regulatory structure for overseeing the safe treatment, storage and disposal of hazardous waste." *United Techs. Corp.* v. *EPA*, 821 F.2d 714, 716 (D.C. Cir. 1987). Subtitle C requires the Environmental Protection Agency (EPA), which administers RCRA, to develop a federal hazardous waste program, including regulations that establish standards applicable to gen-

erators and transporters of hazardous waste, and owners and operators of hazardous waste treatment, storage, and disposal facilities. See 42 U.S.C. 6922-6924.

In accordance with RCRA, EPA has promulgated regulations requiring that owners and operators of hazardous waste treatment, storage, and disposal facilities satisfy financial requirements for closure costs, post-closure costs, and third-party liability. See 42 U.S.C. 6924(a) and (t); 40 C.F.R. 264.140 *et seq.* Those regulations ensure that the owner or operator of a facility has secured funds to provide liability coverage until the facility is finally closed and to cover the cost of closure and post-closure care. EPA's "financial assurance" requirements protect the public from bearing those costs at some later date. See, *e.g.*, 46 Fed. Reg. 2821 (1981); see also 47 Fed. Reg. 15,047 (1982).

RCRA further provides that EPA may authorize a State to carry out a hazardous waste program "in lieu of" the federal hazardous waste program. 42 U.S.C. 6926(b). To receive authorization, a State must establish a hazardous waste program that is equivalent to and consistent with the federal program, and the State must provide for adequate enforcement of the authorized requirements. 42 U.S.C. 6926(b); 40 C.F.R. Pt. 271. Once EPA has authorized a State's hazardous waste program, the authorized State's requirements, rather than the equivalent federal requirements, become the body of requirements that govern facilities within the State. See, *e.g.*, *United States* v. *MacDonald & Watson Waste Oil Co.*, 933 F.2d 35, 43-46 (1st Cir. 1991).

EPA's authorization of state programs accomplishes two principal goals: (1) the authorized state requirements replace the equivalent federal requirements within the State, so that regulated entities need no

longer comply with a separate state hazardous waste program as well as equivalent federal requirements (42 U.S.C. 6926(b)); and (2) the State's authorized requirements become federally enforceable as requirements of RCRA Subtitle C (see 42 U.S.C. 6928(a)(2)). Regardless of federal authorization, States may continue to enforce the hazardous waste requirements in state statutes and regulations using state enforcement authority.

RCRA encourages States to seek authorization of state hazardous waste management programs. See 42 U.S.C. 6902(a)(7). At the same time, RCRA directs EPA to ensure that hazardous wastes are managed nationally in a consistent and effective manner. See 42 U.S.C. 6902(b). Thus, while States may assume primary responsibility for program administration, EPA retains oversight responsibilities concerning the activities regulated under the authorized state programs. RCRA also grants EPA independent authority to take direct enforcement action against a violator of RCRA requirements in a State with an authorized hazardous waste program, so long as it informs the State before taking action. 42 U.S.C. 6928(a).

On November 2, 1984, EPA authorized Colorado's hazardous waste program, which is now managed by the Colorado Department of Public Health and Environment (CDPHE). 49 Fed. Reg. 41,036 (1984). From time to time, Colorado has sought and obtained from EPA additional authorizations for revisions to its hazardous waste program. Colorado's federally authorized financial responsibility regulations are equivalent to and consistent with the federal regulations. See 6 Colo. Code Regs. Pt. 266 (2002).

2. Since 1968, petitioners have operated a metal refinishing and chrome electroplating business located in Denver, Colorado. Pet. App. B4. Petitioners' activi-

ties produced 13 different waste streams and more than 1000 kilograms per month of hazardous waste. *Ibid.* Nonetheless, petitioners failed to comply with federal or state hazardous waste management requirements. *Ibid.*

In August 1992, CDPHE received information that chromium discharges traced to petitioners' facility had caused surface and groundwater contamination. See Pet. App. B4. CDPHE's inspections revealed that petitioners were engaged in the unlawful treatment, storage, and disposal of hazardous wastes. *Ibid.* CDPHE issued a Final Administrative Compliance Order to petitioners that identified numerous violations and required that petitioners remedy those violations. *Ibid.*; *id.* at C3-C5.

CDPHE's order neither identified violations of, nor directed compliance with, the RCRA-mandated financial assurance requirements. Pet. App. C5. The United States asked CDPHE to enforce the financial assurance requirements and informed CDPHE that, if it did not, the United States would bring its own enforcement action. *Ibid.* CDPHE failed to do so. Based on information that petitioner Lilienthal was considering divesting himself of his assets or leaving the country, the United States filed an enforcement action against petitioners in federal district court in Colorado, seeking to compel petitioners to comply with the financial assurance requirements and for other relief. *Ibid.* CDPHE supported the United States' effort to compel petitioners to satisfy financial assurance requirements. 5/11/98 Prelim. Inj. Hr'g Tr. 33, 84. The United States subsequently obtained a preliminary injunction requiring petitioners to provide financial assurances. Pet. App. C6; *United States* v. *Power Eng'g Co.*, 10 F. Supp.

2d 1165 (D. Colo. 1998), aff'd, 191 F.3d 1224 (10th Cir. 1999).

Following the court of appeals' affirmance of the preliminary injunction, the United States dismissed all of its claims against petitioners except the demand for financial assurances. Pet. App. C8. On cross motions for summary judgment, petitioners argued that the United States' enforcement action was barred by CDPHE's prior enforcement action, citing *Harmon Industries* v. *Browner*, 191 F.3d 894 (8th Cir. 1999).

The Eighth Circuit's decision in *Harmon* (which is reproduced at Pet. App. I1-I19) affirmed a district court ruling that a State's settlement of an enforcement action barred EPA from pursuing an ongoing EPA administrative enforcement action addressing the same violations. The Eighth Circuit stated that 42 U.S.C. 6926(b), which provides that EPA may authorize a state hazardous waste program "in lieu of" the federal program, also meant that state enforcement was "in lieu of" federal enforcement. *Harmon*, 191 F.3d at 897-898. The court recognized that RCRA expressly allows the United States to file an enforcement action in an authorized State, 42 U.S.C. 6928(a), but concluded that "[h]armonizing" this provision with Section 6926(b) meant that EPA has a secondary enforcement role in authorized States. *Harmon*, 191 F.3d at 899. According to the Eighth Circuit, that secondary role would allow EPA to take action only if the State took none or, in the alternative, to revoke federal authorization of the State's program pursuant to 42 U.S.C. 6926(e). 191 F.3d at 899. The Eighth Circuit also held that Section 6926(b) created a relationship of privity between EPA and the State and concluded that res judicata therefore barred the EPA action. *Id.* at 902-904.

The district court in this case rejected the conclusion reached in *Harmon* that Section 6926(b) limits federal enforcement in authorized States, noting that Section 6926(b) "primarily addresses the administration and enforcement of state regulations by authorized states, [while] Section 6928 concerns the federal enforcement of such regulations." Pet. App. C17. The district court concluded that "there is no reason to impose restrictions on federal authority [to enforce RCRA] not found explicitly in the statute." *Id.* at C18.

The district court also rejected *Harmon*'s reasoning respecting the res judicata effect of a state enforcement action. Pet. App. C30-C33. The district court observed that this Court has held that the United States is bound by the results of a suit to which it was not a party only when it has "a laboring oar in a controversy." *Id.* at C30 (quoting *Drummond* v. *United States*, 324 U.S. 316, 318 (1945)). The district court declined to adopt the Eighth Circuit's conclusion that EPA effectively pulled the "laboring oar" by authorizing the state hazardous waste program. *Id.* at C31-C32 (citing *Harmon*, 191 F.3d at 904).

Accordingly, the district court denied petitioners' motion for summary judgment and, instead, concluded that petitioners were in violation of RCRA for their failure to provide financial assurances. Pet. App. C42-C44. The district court subsequently held a trial on the outstanding factual issues and ultimately concluded that petitioners were obligated to provide financial assurances in the amount of $2,119,044. *Id.* at B5.

3. The court of appeals affirmed the district court's judgment. Pet. App. B1-B16. The court of appeals concluded that RCRA allows the United States to bring its own enforcement action in an authorized State despite a prior state enforcement action. *Id.* at B5-B13. The

court stated that petitioners' contrary argument "contradicts the plain language of section 6928," which expressly authorizes the United States to bring an enforcement action in an authorized State. *Id.* at B13.

The court of appeals reasoned that Section 6926(b) distinguishes between adopting and implementing a hazardous waste program and enforcing requirements under that program. Congress authorized a State to carry out the state program "in lieu of" the federal program, 42 U.S.C. 6926(b), but it expressly preserved, through Sections 6926(b) and 6928(a), the United States' power to enforce the elements of the state program, provided that the United States gives advance notice of the federal enforcement action, 42 U.S.C. 6928. See Pet. App. B9. The court of appeals further concluded that the Eighth Circuit's construction in *Harmon* went "well beyond the plain language of the statute" and imposed limitations on EPA's enforcement authority not found in Section 6928(a). *Id.* at B10. The court of appeals accordingly embraced EPA's construction, concluding that "EPA's interpretation of RCRA has substantial support in the text of the statute and is therefore a reasonable interpretation of the statute." *Id.* at B13.

The court of appeals also concluded that the United States was not bound by res judicata as a result of the CDPHE enforcement action against petitioners. Pet. App. B13-B15. Citing *Montana* v. *United States*, 440 U.S. 147, 153 (1979), and *Drummond*, *supra*, it concluded that the United States could not be bound by the results of the CDPHE suit because the United States was neither a party in that suit nor exercised control over the litigation. Pet. App. B14-B15 (citing *Drummond*, 324 U.S. at 316, and *Montana*, 440 U.S. at 154-155).

4. Following the court of appeals' decision, the parties entered into settlement negotiations. After the court of appeals issued its mandate, the parties filed a "Joint Motion and Memorandum to Terminate Litigation" with the district court. App., *infra*, 1a-4a. That motion asked the district court to modify its judgment to reduce petitioners' financial assurances obligation from $2,229,044 to $1,324,102. *Id.* at 3a. The joint motion also asked the district court to dismiss all other pending motions of the parties and to "[e]nter an order terminating this litigation subject to the Court's continuing jurisdiction over its Judgment." *Ibid.* The joint motion contains no reservation by petitioners of the right to appeal any issue in this case. On December 20, 2002, the district court issued an order granting the joint motion. *Id.* at 5a-6a.

ARGUMENT

This Court should deny the petition for a writ of certiorari because the district court has issued an order terminating the litigation and rendering the question presented moot. Moreover, notwithstanding petitioners' claim that the court of appeals' decision conflicts with a decision of the Eighth Circuit, there is no current need for this Court to address the issue because the decision in this case is correct, and the issue is unlikely to recur with sufficient frequency to call for this Court's review.

1. This Court exercises its jurisdiction only over live cases or controversies. U.S. Const. Art. III, § 2. See, *e.g.*, *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 67 (1997) ("[A]n actual controversy must be extant at all stages of review."). A federal court—including this Court—has no authority to "give opinions upon moot questions or abstract propositions, or to

declare principles or rules of law which cannot affect the matter in issue in the case before it." *Church of Scientology* v. *United States*, 506 U.S. 9, 12 (1992). Consequently, neither this Court nor the courts of appeals undertake review on the merits in cases that are settled during the course of appellate proceedings. See, *e.g*, *U.S. Bancorp Mortgage Co.* v. *Bonner Mall Partnership*, 513 U.S. 18, 23 (1994); *Lake Coal Co.* v. *Roberts & Schaefer Co.*, 474 U.S. 120 (1985) (per curiam) (denying motion of parties requesting a decision on issues presented in a petition for writ of certiorari after the parties settled the case); *Vela* v. *City of Houston*, 276 F.3d 659, 682 (5th Cir. 2001) ("We have repeatedly recognized that settlement between the parties renders an appeal moot and requires dismissal of the issues that have been settled."); *Affholder, Inc.* v. *Preston Carroll Co.*, 866 F.2d 881, 885 (6th Cir. 1989) ("Settlement of a claim before a final adjudication moots the claim and deprives the federal judiciary of jurisdiction over the claim."); *International Union* v. *Dana Corp.*, 697 F.2d 718, 719 (6th Cir. 1983) (dismissing as moot a case that settled while on appeal).

The Joint Motion and Memorandum to Terminate Litigation, signed by counsel for each of the parties, constituted an agreement to settle the case. It prescribed the amount of financial assurances to be provided by petitioners; it requested the district court to modify the judgment amount to conform to that lower amount; and it asked the court to enter an order terminating the litigation. See App., *infra*, 1a-4a. The district court granted the motion in full, modifying the judgment as requested by the parties and terminating the action. *Id.* at 5a-6a.

The district court's order accordingly renders the question presented in this case moot. By virtue of the

Joint Motion and Memorandum to Terminate Litigation, petitioners agreed to be obligated to provide financial assurances in the agreed amount. The district court retained only "continuing jurisdiction over the judgment," App., *infra*, 6a, which preserved the district court's authority to ensure that petitioners' fulfilled their obligations under the judgment. Neither the joint motion nor the district court's order contained a reservation of a right to appeal any issue in this case, and no appeal, in fact, has been taken from the district court's modified judgment. Accordingly, there is no longer any controversy and the case is moot.

2. In any event, the court of appeals' decision is correct. Section 6928(a)(1) of RCRA authorizes the United States to take enforcement action if EPA determines that "any person has violated or is in violation of any requirement" of RCRA. 42 U.S.C. 6928(a)(1). Section 6928(a)(2) expressly addresses "the case of a violation of any requirement of [RCRA] where such violation occurs in a State which is authorized to carry out a hazardous waste program under section 6926 of this title." 42 U.S.C. 6928(a)(2). In that situation, EPA

> shall give notice to the State in which such violation has occurred prior to issuing an order or commencing a civil action under this section.

Ibid. Thus, the United States plainly retains the right to bring an enforcement action in an authorized State, subject only to the condition that it first give notice. If Congress had wanted to impose additional conditions or limitations on the United States' enforcement authority, it would have placed those restrictions, along with the notice requirement, in Section 6928(a)(2). For example, Congress has authorized private citizens to bring RCRA enforcement actions, but, in the same

provision authorizing citizen suits, Congress has specifically disallowed citizen action in those instances in which the "State has commenced and is diligently prosecuting a civil or criminal action." 42 U.S.C. 6972(b)(1)(B). Congress's failure to place a similar limitation on federal enforcement actions demonstrates that Congress did not wish to preclude federal enforcement actions seeking relief that the State has declined to pursue.

Petitioners argue at length that federal enforcement actions would "usurp" a State's enforcement role, Pet. 15-22, but petitioners' sole statutory basis for urging that RCRA precludes the federal enforcement action at issue here is Section 6926(b), which provides that a State that receives federal authorization to administer a hazardous waste program under RCRA is authorized to carry out such program "in lieu of the Federal program." 42 U.S.C. 6926(b). That Section, however, does not address, much less preclude exercise of, the federal government's enforcement power under Section 6928(a). Rather, Section 6926(b) provides that an authorized State

> is authorized to carry out such program in lieu of the Federal program under this subchapter in such State *and* to issue and enforce permits for the storage, treatment, or disposal of hazardous waste (and to enforce permits deemed to have been issued under section 6935(d)(1) of this title) * * *.

42 U.S.C. 6926(b) (emphasis added). As the district court and court of appeals pointed out, RCRA refers separately to a State's carrying out its authorized hazardous waste program "in lieu of" the federal program and to a State's exercise of enforcement powers that necessarily co-exist with the federal enforcement

powers set out in Section 6928(a). Pet. App. B8-B9, C16-C18. Section 6926(b) plainly does not provide that a State *enforces* its program "in lieu of" federal enforcement, and Section 6926(b) cannot sensibly be read to displace the federal government's express enforcement powers. *Ibid.* See *Freytag* v. *Commissioner*, 501 U.S. 868, 877 (1991) (Statutory interpretations that "render superfluous other provisions in the same enactment" are disfavored.).

The court of appeals also correctly concluded that the United States could not be barred from bringing its own enforcement suit by principles of res judicata. As this Court made clear in *Montana*, 440 U.S. at 155, and *Drummond*, 324 U.S. at 318, the United States cannot be subjected to the bar of res judicata if the United States neither was a party to nor assumed control of the prior litigation. Petitioners point to no evidence that the United States assumed control of the CDPHE's enforcement action. Indeed, any claim that the United States controlled the state action is particularly far-fetched where CDPHE declined EPA's request to seek financial assurances from petitioners. Pet. App. B5.

3. Petitioners claim that the court of appeals' decision in this case conflicts with the Eighth Circuit's decision in *Harmon*, but even if that is so, there is no need for this Court to resolve that asserted conflict at this time. The United States rarely undertakes RCRA enforcement actions against a party if an authorized State has previously brought its own enforcement action. Indeed, although Congress enacted RCRA in 1976, no court of appeals had occasion to address the issue until *Harmon*, which was decided in 1999. The Tenth Circuit's decision in this case is the only other

court of appeals decision that squarely addresses the issue presented here.

The issue is not likely to recur with significant frequency. As EPA has explained to Congress, it is unusual for the federal government to undertake enforcement action in the wake of a state enforcement action under any of three major federal environmental statutes—the Clean Water Act, 33 U.S.C. 1251 *et seq.*, the Clean Air Act, 42 U.S.C. 7401 *et seq.*, and RCRA. See *Enforcement of Environmental Laws: Hearing Before the Senate Comm. on Environment and Public Works*, 105th Cong., 1st Sess. 156-162 (1997) (*Hearing*) (statement of Steven A. Herman, Assistant Administrator, Office of Enforcement and Compliance, EPA).

For example, during fiscal years 1992 through 1996, the States brought 50,856 enforcement actions under those three major environmental programs. See Office of Enforcement and Compliance Assurance, U.S. Environmental Protection Agency, *Pub. No. 300-R-98-003, Enforcement and Compliance Assurance Accomplishments FY 1997*, at 2-1, tbl. A-6 (1998). Yet, during fiscal years 1992 through 1994, the federal government brought an enforcement action after the conclusion of a state enforcement action in only 30 instances under all three statutes combined. *Hearing* 161. During fiscal years 1994 and 1995, EPA brought such actions in a total of 18 cases. *Id.* at 162. During fiscal year 1996, EPA filed its own actions following a state action in four cases. *Ibid.*

Accordingly, there is no reason to believe that "a considerable number of suits are pending in the lower courts which will turn on resolution of these issues." *Massachusetts Trustees* v. *United States*, 377 U.S. 235, 237 (1964). It is conceivable that the issue presented here might eventually merit this Court's examination.

But there is no warrant for review at this time, particularly in a case that is moot.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 2003

APPENDIX A

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

Civil Action No. 97-B-1654

UNITED STATES OF AMERICA, PLAINTIFF

v.

POWER ENGINEERING COMPANY, REDOUBT, LTD., AND RICHARD J. LILIENTHAL, DEFENDANTS

JOINT MOTION AND MEMORANDUM TO TERMINATE LITIGATION

[Filed Dec. 19, 2002]

Plaintiff, the United States and Defendants, Power Engineering Company, Redoubt Ltd., and Richard J. Lilienthal, respectfully hereby submit this joint motion and memorandum to terminate the above captioned litigation to the Court. Plaintiff and Defendants state as follows:

1. On February 28, 2001 the Court entered Findings of Fact, Conclusions of Law, and Order directing that:

> Defendants provide $2,119,044 in financial assurances within 60 days of the date of this Order in the form of surety bond guaranteeing payment into a closure or post closure trust fund or in any other

form acceptable to the plaintiff and specified in Part 266 [6 Colo. Code Regs. 1007-3 Part 266]; and

Obtain liability coverage for sudden accidental occurrences in the amount of at least $1 million per occurrence with annual aggregate of at least $2 million exclusive of legal defense costs;

2. On March 7, 2001 the February 28, 2001 Order was reduced to a Judgment;

3. On April 26, 2001 Defendants took appeal from that Judgment. On September 4, 2002, in *United States of America, v. Power Engineering Company; Redoubt, Ltd.; and Richard J. Lilienthal*, 303 F.3d 1232 (10th Cir. 2002), the Tenth Circuit affirmed the rulings of the District Court;

4. On October 15, 2002 (hereafter "Anniversary") Defendants submitted to Plaintiff and the State of Colorado an updated closure and post closure cost estimate in the amount of $1,132,164.00 for the work required at the Power Engineering Facility to respond to the Colorado Department of Health and the Environment's ("CDPHE") Compliance Order No. 94-07-29-01(Final). Plaintiff, in consultation with the State of Colorado, reviewed that estimate and found it to be satisfactory; and

5. On October 15, 2002, Defendants submitted to Plaintiff and the State of Colorado documents evidencing a financial assurances trust maintained by Defendants for the benefit of the CDPHE in the amount of $1,324,102.00 and documents evidencing third party liability coverage. Plaintiff, in consultation with the State of Colorado, reviewed those documents and found deficiencies. Defendants have agreed to seek the changes necessary to conform to the regulatory re-

quirements and are currently working to that end with their bank trustee and insurance carrier. In light of the updated cost estimate for the work to be completed under Compliance Order No. 94-07-29-01(Final) at the Power Engineering Facility, Plaintiff, after consultation with the State of Colorado, determined that the amount of financial assurances are sufficient in light of the estimated cost of the remaining work.

WHEREFORE, Plaintiff and Defendants jointly move that the Court:

A. Enter an order dismissing without prejudice all Plaintiff's and Defendants' pending motions;

B. Modify in part the February 28, 2001 Findings of Fact, Conclusions of Law, and Order and the March 7, 2001 Judgment to amend the amount of financial assurances to be maintained by Defendant to be no less than $1,324,102.00 as adjusted annually per Colo. Code Regs. 1007-3 Part 266;

C. Order Defendants to maintain financial assurances and third party liability insurance in accordance with the Order and Judgment, as modified, for the benefit of the CDPHE and the public and to review and update the closure and post closure cost estimates, financial assurances, and third-party liability insurance annually on the Anniversary date pursuant to 6 Colo. Code Regs. 1007-3 Part 266; and

D. Enter an order terminating this litigation subject to the Court's continuing jurisdiction over its Judgment.

Dated this 19th day of December, 2002.

Respectfully submitted,

Counsel For Plaintiff

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APPENDIX B

UNITED STATES DISTRICT COUR T FOR THE DISTRICT OF COLORADO
LEWIS T. BABCOCK, CHIEF JUDGE

Civil Case No. 97-B-1654 (OES)

UNITED STATES OF AMERICA, PLAINTIFF

v.

POWER ENGINEERING COMPANY, REDOUBT, LTD., AND RICHARD J. LILIENTHAL, DEFENDANTS

ORDER

[Filed Dec. 23, 2002]

Upon joint motion to terminate litigation, filed December 19, 2002,

IT IS ORDERED as follows:

1. This action is DISMISSED WITHOUT PREJUDICE,

2. The February 28, 2001, Findings of Fact, Conclusions of Law, and Order and the March 7, 2001 Judgment are modified to amend the amount of financial assurances to be maintained by defendants to be no less than $1,324,102.00 as adjusted annually per 6 Colo. Code Regs. 1007-3 Part 266;

3. The defendants are to maintain financial assurances and third party liability insurance in accordance with the Order and judgment, as modified, for the benefit of the CDPHE and the public and to review and update the closure and post closure cost estimates, financial assurances, and third-party liability insurance annually on the anniversary date pursuant to 6 Colo. Code Regs. 1007-3 Part 266; and

4. This litigation is terminated subject to this court's continuing jurisdiction over the judgment.

DATED: December 20, 2002

BY THE COURT:

/s/ LEWIS T. BABCOCK
LEWIS T. BABCOCK
Chief Judge